FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No.....(Original)

STATE OF ARIZONA

Complainant,

VS.

STATE OF CALIFORNIA, STATE OF COLORADO, STATE OF NEVADA, STATE OF NEW MEXICO, STATE OF UTAH, STATE OF WYOMING, HAROLD L. ICKES, Secretary of the Interior of the United States, PALO VERDE IRRIGATION DISTRICT, a public corporation of the State of California, IMPERIAL IRRIGATION DISTRICT, a public corporation of the State of California, COACHELLA VALLEY COUNTY WATER DISTRICT, a public corporation of the State of California, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, a public corporation of the State of California, CITY OF LOS ANGELES, a municipal corporation of the State of California, CITY OF SAN DIEGO, a municipal corporation of the State of California, and COUNTY OF SAN DIEGO, a public corporation of the State of California,

Defendants.

MOTION FOR LEAVE TO FILE BILL TO PERPETUATE TESTIMONY

and

BILL TO PERPETUATE TESTIMONY

and

STATEMENT AS TO JURISDICTION

ARTHUR T. LAPRADE,
Attorney General of the State of Arizona, Solicitor for Complainant.

CHARLES A. CARSON, JR.
A. M. CRAWFORD,
Of Counsel.

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Defendants.

MOTION FOR LEAVE TO FILE BILL TO PERPETUATE TESTIMONY

The State of Arizona, appearing by its Attorney General, respectfully moves and prays the Court for leave to file its bill to perpetuate testimony, herewith submitted.

ARTHUR T. LAPRADE,
Attorney General of the State of Arizona, Solicitor for Complainant.

CHARLES A. CARSON, JR.
A. M. CRAWFORD,
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Defendants.

BILL TO PERPETUATE TESTIMONY

The State of Arizona, appearing by its Attorney General, by leave of Court files this, its bill to perpetuate testimony, and respectfully alleges:

I

That the State of Arizona, complainant herein, and the States of California, Colorado, Nevada,

New Mexico, Utah and Wyoming, defendants herein, are state of the Union, duly admitted thereto and exercising equal sovereignty with the original and all other States of the Union. Defendant Harold L. Ickes, is the duly appointed, qualified and acting Secretary of the Interior of the United States. The Palo Verde Irrigation District, the Imperial Irrigation District, the Coachella Valley County Water District and the Metropolitan Water District of Southern California, and each of them, are public corporations organized and existing under and by virtue of the laws of the State of California in said State. The City of Los Angeles and the City of San Diego, and each of them, are municipal corporations organized and existing under and by virtue of the laws of the State of California, in said State. The County of San Diego is a quasi municipal and public corporation, organized and existing under and by virtue of the laws of the State of California, in said State.

II

That this bill is filed for the sole purpose of perpetuating testimony.

III

That the complainant, at sometime in the future will commence an action, or actions, in this Court against the above named defendant States, or some of them, and against the above named corporations and municipal corporations of the State of

California, or some of them, and against the present Secretary of the Interior of the United States, or his successor in office, arising out of the controversy hereinafter set forth. That the testimony of certain persons now living will be material and necessary evidence on behalf of complainant in said action, or actions, which said testimony will be lost unless the same is perpetuated in this proceeding. That at the present time the complainant's cause and causes of action have not accrued and may not accrue for some years to come.

IV

That the nature of the controversy which is expected to be the subject of said action, or actions, to be commenced in this Court, is as follows:

(a) The Colorado River and its tributaries drain all or portions of the States parties hereto, and flow through or on the borders of each of said States. Some portion of the waters of said Colorado River and its tributaries is now beneficially and consumptively used in each of said States and each of said States claim the right to appropriate and beneficially use additional waters from said Colorado River and its tributaries.

(b) All the land in the State of Arizona is arid in character. There are in Arizona more than 2,000,000 acres of land which are not now irrigated, but which are susceptible of irrigation from the waters of the Colorado River and its tributaries, and

which cannot be irrigated by any other means or from any other source. All of said land is extremely fertile and when irrigated will be very productive. The future welfare, growth, population and prosperity of the State of Arizona depends upon irrigation of said lands from said Colorado River.

(c) That on August 19, 1921, there was passed by the Congress of the United States (42nd Statutes at Large, page 171) an Act which authorized the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming to enter into a compact regarding the waters of the Colorado River, which said Act was and is in words and figures as follows, to-wit:

> "An act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming, respecting the disposition and apportionment of waters of the Colorado River, and for other purposes (Act August 19, 1921, ch. 72, 42 Stat. 171.).
>
> (Sec. 1. Preamble—Apportionment of waters—Federal representative to be appointed—Expenses—Approval.) — Whereas the Colorado River and its several tributaries rise within and flow through or from the boundaries between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming; and

Whereas, the territory included within the drainage area of the said stream and its tributaries is largely arid and in small part irrigated, and the present and future development necessities and general welfare of each of said States and of the United States require the further use of the waters of said streams for irrigation and other beneficial purposes, and that future litigation and conflict respecting the use and distribution of said waters should be avoided and settled by compact between said States; and

Whereas, the said States, by appropriate legislation, have authorized the governors thereof to appoint commissioners to represent said states for the purpose of entering into a compact or agreement between said States respecting the future utilization and disposition of the waters of the Colorado River and of the streams tributary thereto; and

Whereas, the governors of said several States have named and appointed their respective commissioners for the purposes aforesaid, and have presented their resolution to the President of the United States requesting the appointment of a representative on behalf of the United States to participate in said negotiations and to represent the interests of the United States; Now, therefore,

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That consent of Congress is hereby given to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming to negotiate and enter into a compact or agreement not later than January 1, 1923, providing for an equitable division and apportionment among said States of the water supply of the Colorado River and of the streams tributary thereto, upon condition that a suitable person, who shall be appointed by the President of the United States, shall participate in said negotiations, as the representative of and for the protection of the interests of the United States, and shall make report to Congress of the proceedings and of any compact or agreement entered into, and the sum of $10,000, or so much thereof as may be necessary, is hereby authorized to be appropriated to pay the salary and expenses of the representative of the United States appointed hereunder: PROVIDED, That any such compact or agreement shall not be binding or obligatory upon any of the parties thereto unless and until the same shall have been approved by the legislature of each of said States and by the Congress of the United States. (42 Stat. 171).

Sec. 2. (Right to amend reserved.)—That the right to alter, amend, or repeal this act is herewith expressly reserved. (42 Stat. 172.)."

That acting under and pursuant to the provisions of said Act, the President of the United States appointed Honorable Herbert Hoover as the representative of and for the protection of the interests of the United States in the negotiations therein authorized. The State of Arizona appointed Honorable W. S. Norviel as its representative. The State of California appointed Honorable W. F. McClure as its representative. The State of Colorado appointed Honorable Delph E. Carpenter as its representative. The State of Nevada appointed Honorable J. G. Scrugham as its representative. The State of New Mexico appointed Honorable Stephen B. Davis, Jr., as its representative. The State of Utah appointed Honorable R. E. Caldwell as its representative. The State of Wyoming appointed Honorable Frank C. Emerson as its representative.

That the said several State representatives and their advisors and agents, with the said Honorable Herbert Hoover, representative of the United States, and his advisors and agents, met on sundry and divers occasions and conferred on the matter of division of the waters of the Colorado River pursuant to the provisions of said act of Congress.

That Honorable Clarence C. Stetson, now of

the State of Maine, was named executive secretary of said meetings.

That it was concluded by the said representatives in their negotiations that insufficient information was available to justify a division of the waters among the several states, as such, and a plan was evolved to divide the states into two groups, one designated as the Upper Basin and the other as the Lower Basin. The term Upper Basin was used to designate those parts of the States of Arizona, Colorado, New Mexico, Utah and Wyoming within and from which waters naturally drain into the Colorado River system above Lee Ferry. The term Lower Basin was used to designate those parts of the States of Arizona, California, Nevada, New Mexico and Utah within and from which waters naturally drain into the Colorado River system below Lee Ferry and also all parts of states located without the drainage area of the Colorado River system, which then or thereafter should be beneficially served by waters from the system below Lee Ferry.

The Honorable Richard E. Sloan, former Governor of the Territory of Arizona, now deceased, as legal advisor on behalf of the State of Arizona, the Honorable Thomas E. Campbell, then Governor of the State of Arizona, and the Honorable C. C. Lewis, then Assistant Water Commissioner of the State of Arizona, attended said conference as advisors to the Honorable W. S. Norviel, the official

presentative of the State of Arizona at said con-
rence.

At the conference between said representa-
ves, it was proposed to define the Colorado River
stem as including the main stream of said Colo-
do River and all of its tributaries within the
nited States of America. This definition included
e waters of the Gila River and its tributaries in
rizona. The waters of the Gila River and its trib-
aries at that time were substantially appropriated
d so far as the development thereof had then pro-
essed, all of the waters thereof were then in use.
ne representatives of the State of Arizona, objected
the inclusion of the Gila River and its tributaries
the definition of the Colorado River system to be
portioned by the proposed compact, said repre-
ntatives were seeking to negotiate, on account of
e fact that the waters of the said Gila River and
s tributaries were then appropriated and in use
d the further fact that the waters of the Gila
ver enter the main stream of the Colorado River
a point so far down stream and of such low ele-
tion that it was and is impossible to put the wa-
rs thereof to beneficial use in the United States
ter they reach the main stream of the Colorado
ver and that no other state was or could be inter-
ted therein.

A draft of the proposed compact, based on
e inclusion of the Gila River and its tributaries
thin the definition of the Colorado River system,

and the division of the waters thereof between the upper basin and the lower basin, as hereinbefore defined, was prepared and submitted to said conference. The representatives of all the States and the United States except the Arizona delegation were in agreement as to the definition of the Colorado River system, including the Gila River and its tributaries, and as to the division proposed, which substantially apportioned the waters of the Colorado River at Lee Ferry, the point selected as dividing the Upper Basin from the Lower Basin. The Arizona delegation refused and declined to accept the proposed compact because of the inclusion of the Gila River and its tributaries without any compensating provision to the State of Arizona in lieu of the waters thereof, which had already been appropriated and in which no other State could have any interest on account of the further fact that the waters of the Gila River and its tributaries enter the Colorado River at Yuma, at a point so far down stream and of such low elevation that it was and is impossible to put the waters thereof to beneficial use in the United States after they reach the main stream of the Colorado River. Hence, the Arizona delegation pointed out that the conference was discussing something which had already been disposed of and in any event could not concern any State, other than Arizona. Several days elapsed in a discussion between the said representatives of this problem before a solution was found. The problem was finally thought

ved by adding Subdivision (b) of Article III to
compact as finally approved by said representa-
es, which reads as follows:

> "(b) In addition to the apportionment in paragraph (a), the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre-foot per annum."

It was agreed between all of the representa-
es of the various States and the representative of
e United States, negotiating said compact, that
d one million acre-feet apportioned by subdivision
) of Article III of said compact was intended for
d should go to the State of Arizona to compensate
the waters of the Gila River and its tributaries
ing included within the definition of the Colorado
ver system and the allocations of said compact,
d that said one million acre-feet was to be used ex-
sively by and for the State of Arizona, that being
e approximate amount of water then in use within
e State of Arizona from the Gila River and its
butaries, and it was agreed that in view of the
ct that no appropriation or allocation of water had
herwise been made by said compact directly to any
ate, the one million acre-feet for the State of Ari-
na should be included in said compact by an alloca-
n for the Lower Basin. And it was further
reed that a supplemental compact between the
ates, California, Nevada and Arizona should be

adopted and that such supplemental compact should so provide.

The Arizona delegation stated that if it were agreed by all of the representatives of the several States and of the United States that said million acre-feet should be for the exclusive benefit of the State of Arizona to provide compensation to Arizona on account of the inclusion of the waters of the Gila River and its tributaries in said compact, they would accept said compact, otherwise they would refuse to accept said compact. It was thereupon agreed by all representatives of all the States and of the United States, participating in said negotiations and conference, that the waters apportioned by Article III, (b), of said compact were for the sole and exclusive use and benefit of the State of Arizona, and it was further agreed that a supplemental compact between the States of California, Nevada and Arizona should be adopted and that such supplemental compact should so provide. Thereupon said compact was signed by the representatives of the several States and of the United States. The compact as finally signed at Santa Fe, called the Colorado River Compact, was and is in words and figures as follows, to-wit:

COLORADO RIVER COMPACT

The States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, having resolved to enter into a com-

pact under the act of the Congress of the United States of America approved August 19, 1921, (42 Stat. L., P. 171), and the acts of the legislatures of the said States, have through their governors appointed as their commissioners; W. S. Norviel for the State of Arizona, W. F. McClure for the State of California, Delph E. Carpenter for the State of Colorado, J. G. Scrugham for the State of Nevada, Stephen B. Davis, Jr., for the State of New Mexico, R. E. Caldwell for the State of Utah, Frank C. Emerson for the State of Wyoming, who, after negotiations participated in by Herbert Hoover, appointed by the President as the representative of the United States of America, have agreed upon the following articles:

ARTICLE I. The major purposes of this compact are to provide for the equitable division and apportionment of the use of the waters of the Colorado River system; to establish the relative importance of different beneficial uses of water; to promote interstate comity; to remove causes of present and future controversies and to secure the expeditious agricultural and industrial development of the Colorado River Basin, the storage of its waters, and the protection of life and property from floods. To these ends the Colorado River Basin is divided into two basins and an appor-

tionment of the use of part of the waters of the Colorado River system is made to each of them with the provision that further equitable apportionments may be made.

ARTICLE II. As used in this compact—

(a) The term "Colorado River system" means that portion of the Colorado River and its tributaries within the United States of America.

(b) The term "Colorado River Basin" means all of the drainage area of the Colorado River system and all other territory within the United States of America to which the waters of the Colorado River system shall be beneficially applied.

(c) The term "States of the upper division" means the States of Colorado, New Mexico, Utah and Wyoming.

(d) The term "States of the lower division" means the States of Arizona, California and Nevada.

(e) The term "Lee Ferry" means a point in the main stream of the Colorado River, 1 mile below the mouth of the Paria River.

(f) The term "Upper Basin" means those parts of the States of Arizona, Colorado, New Mexico, Utah, and Wyoming within and from which waters naturally drain into the

Colorado River system above Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River system which are now or shall hereafter be beneficially served by waters diverted from the system above Lee Ferry.

(g) The term "Lower Basin" means those parts of the States of Arizona, California, Nevada, New Mexico, and Utah within and from which waters naturally drain into the Colorado River system below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River system which are now or shall hereafter be beneficially served by waters diverted from the system below Lee Ferry.

(h) The term "domestic use" shall include the use of water for household, stock, municipal, mining, milling, industrial and other like purposes, but shall exclude the generation of electrical power.

ARTICLE III. (a) There is hereby apportioned from the Colorado River system in perpetuity to the upper basin and to the lower basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

(b) In addition to the apportionment in Paragraph (a), the lower basin is hereby given the right to increase its beneficial consumptive use of such waters by 1,000,000 acre-feet per annum.

(c) If, as a matter of international comity, the United States of America, shall hereafter recognize in the United States of Mexico any right to the use of any waters of the Colorado River system, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the upper basin and the lower basin, and whenever necessary the States of the upper division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d).

(d) The States of the upper division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of 10 consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact.

(e) The States of the upper division shall

not withhold water, and the States of the lower division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses.

(f) Further equitable apportionment of the beneficial uses of the waters of the Colorado River system unapportioned by paragraphs (a), (b) and (c) may be made in the manner provided in Paragraph (g) at any time after October 1, 1963, if and when either basin shall have reached its total beneficial consumptive use as set out in paragraphs (a) and (b).

(g) In the event of a desire for a further apportionment as provided in paragraph (f) any two signatory States, acting through their governors, may give joint notice of such desire to the governors of the other signatory States and to the President of the United States of America, and it shall be the duty of the governors of the signatory States and of the President of the United States of America forthwith to appoint representatives, whose duty it shall be to divide and apportion equitably between the upper basin and lower basin the beneficial use of the unapportioned water of the Colorado River system as mentioned in paragraph (f), subject to the legislative ratification of the signatory States and the Congress of the United States of America.

ARTICLE IV. (a) Inasmuch as the Colorado River has ceased to be navigable for commerce and the reservation of its waters for navigation would seriously limit the development of its basin, the use of its waters for purposes of navigation shall be subservient to the uses of such waters for domestic, agricultural and power purposes. If the Congress shall not consent to this paragraph, the other provisions of this compact shall nevertheless remain binding.

(b) Subject to the provisions of this compact, water of the Colorado River system may be impounded and used for the generation of electrical power, but such impounding and use shall be subservient to the use and consumption of such water for agricultural and domestic purposes and shall not interfere with or prevent use for such dominant purposes.

(c) The provisions of this article shall not apply to or interfere with the regulations and control by any State within its boundaries of the appropriation, use and distribution of water.

ARTICLE V. The chief official of each signatory State charged with the administration of water rights, together with the Director of the United States Reclamation Service

and the Director of the United States Geological Survey, shall co-operate, ex-officio—

(a) To promote the systematic determination and co-ordination of the facts as to flow, appropriation, consumption, and use of water in the Colorado River Basin, and the interchange of available information in such matters.

(b) To secure the ascertainment and publication of the annual flow of the Colorado River at Lee Ferry.

(c) To perform such other duties as may be assigned by mutual consent of the signatories from time to time.

ARTICLE VI. Should any claim or controversy arise between any two or more of the signatory States: (a) With respect to the waters of the Colorado River system not covered by the terms of this compact; (b) Over the meaning or performance of any of the terms of this compact; (c) as to the allocation of the burdens incident to the performance of any article of this compact or the delivery of waters as herein provided; (d) as to the construction or operation of works within the Colorado River Basin to be situated in two or more States, or to be constructed in one State for the benefit of another State; or (e) as to the diversion of water in one State for the

benefit of another State, the governors of the States affected upon the request of one of them, shall forthwith appoint commissioners with power to consider and adjust such claim or controversy, subject to ratification by the legislatures of the States so affected.

Nothing herein contained shall prevent the adjustment of any such claim or controversy by any present method or by direct future legislative action of the interested States.

ARTICLE VII. Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes.

ARTICLE VIII. Present perfected rights to the beneficial use of waters of the Colorado River system are unimpaired by this contract. Whenever storage capacity of 5,000,000 acre-feet shall have been provided on the main Colorado River within or for the benefit of the lower basin, then claims of such rights, if any, by appropriators or users of water in the lower basin against appropriators or users of water in the upper basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.

All other rights to beneficial use of waters of the Colorado River system shall be

satisfied solely from the water apportioned to that basin in which they are situate.

ARTICLE IX. Nothing in this compact shall be construed to limit or prevent any State from instituting or maintaining any action or proceeding, legal or equitable, for the protection of any right under this compact or the enforcement of any of the provisions.

ARTICLE X. This compact may be terminated at any time by the unanimous agreement of the signatory States. In the event of such termination, all rights established under it shall continue unimpaired.

ARTICLE XI. This compact shall become binding and obligatory when it shall have been approved by the legislature of each of the signatory States and by the Congress of the United States. Notice of approval by the legislature shall be given by the governor of each signatory State to the governors of the other signatory States and to the President of the United States, and the President of the United States is requested to give notice to the governors of the signatory States of approval by the Congress of the United States.

In witness whereof the commissioners have signed this compact in a single original, which shall be deposited in the archives of the Department of State of the United States of

America and of which a duly certified copy shall be forwarded to the governor of each of the signatory States.

Done at the city of Santa Fe, N. Mex., this 24th day of November, A. D. 1922.

W. S. NORVIEL,
W. F. McCLURE,
DELPH E. CARPENTER,
J. G. SCRUGHAM,
STEPHEN B. DAVIS, JR.,
R. E. CALDWELL,
FRANK C. EMERSON.

Approved:

HERBERT HOOVER.

That by the terms of said compact it was to be binding when it had been ratified and approved by the legislatures of the several States and by the Congress of the United States. The States of California, Colorado, Nevada, New Mexico, Utah and Wyoming have ratified said compact. The supplementary compact agreed to be adopted between the States of California, Nevada and Arizona was never negotiated or signed, and the State of Arizona has not ratified said Colorado River compact.

(d) That on December 21, 1928, an act was passed by the Congress of the United States known as the Boulder Canyon Project Act, which was and is in words and figures as follows, to-wit:

BOULDER CANYON PROJECT ACT

(Public—No. 642—70th Congress)
(H. R. 5773)

An act to provide for the construction of works for the protection and development of the Colorado River Basin, for the approval of the Colorado River compact, and for other purposes.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generation of electrical energy as a means of making the project herein authorized a self-supporting and financially solvent undertaking, the Secretary of the Interior, subject to the terms of the Colorado River compact, hereinafter mentioned, is hereby authorized to construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon adequate to create a storage reservoir of a capacity of not less than twenty million acre-feet of water and a main canal

and appurtenant structures located entirely within the United States connecting the Laguna Dam, or other suitable diversion dam, which the Secretary of the Interior is hereby authorized to construct if deemed necessary or advisable by him upon engineering or economic considerations, with the Imperial and Coachella Valleys in California, the expenditures for said main canal and appurtenant structures to be reimbursable, as provided in the reclamation law, and shall not be paid out of revenues derived from the sale or disposal of water power or electric energy at the dam authorized to be constructed at said Black Canyon or Boulder Canyon, or for water for potable purposes outside of the Imperial and Coachella Valleys: PROVIDED, HOWEVER, That no charge shall be made for water or for the use, storage, or delivery of water for irrigation or water for potable purposes in the Imperial or Coachella Valleys; also to construct and equip, operate, and maintain at or near said dam, or cause to be constructed, a complete plant and incidental structures suitable for the fullest economic development of electrical energy from the water discharged from said reservoir; and to acquire by proceedings in eminent domain, or otherwise, all lands, rights of way, and other property necessary for said purposes.

Sec. 2 (a) There is hereby established a special fund, to be known as the "Colorado River Dam fund" (Hereinafter referred to as the "fund"), and to be available, as hereafter provided, only for carrying out the provisions of this act. All revenues received in carrying out the provisions of this act shall be paid into and expenditures shall be made out of the fund, under the direction of the Secretary of the Interior.

(b) The Secretary of the Treasury is authorized to advance to the fund, from time to time and within the appropriations therefor, such amounts as the Secretary of the Interior deems necessary for carrying out the provisions of this act, except that the aggregate amount of such advances shall not exceed the sum of $165,000,000. Of this amount the sum of $25,000,000 shall be allocated to flood control and shall be repaid to the United States out of 62½ per centum of revenues, if any, in excess of the amount necessary to meet periodical payments during the period of amortization, as provided in section 4 of this act. If said sum of $25,000,000 is not repaid in full during the period of amortization, then 62½ per centum of all net revenues shall be applied to payment of the remainder. Interest at the rate of 4 per centum per annum accruing during the year upon the

amounts so advanced and remaining unpaid shall be paid annually out of the fund, except as herein otherwise provided.

(c) Moneys in the fund advanced under subdivision (b) shall be available only for expenditures for construction and the payment of interest during construction, upon the amounts so advanced. No expenditures out of the fund shall be made for operation and maintenance except from appropriations therefor.

(d) The Secretary of the Treasury shall charge the fund as of June 30 in each year with such amount as may be necessary for the payment of interest on advances made under subdivision (b) at the rate of 4 per centum per annum accrued during the year upon the amounts so advanced and remaining unpaid, except that if the fund is insufficient to meet the payment of interest the Secretary of the Treasury may, in his discretion, defer any part of such payment, and the amount so deferred shall bear interest at the rate of 4 per centum per annum until paid.

(e) The Secretary of the Interior shall certify to the Secretary of the Treasury, at the close of each fiscal year, the amount of money in the fund in excess of the amount necessary for construction, operation, and maintenance, and payment of interest. Upon

receipt of each such certificate the Secretary of the Treasury is authorized and directed to charge the fund with the amount so certified as repayment of the advances made under subdivision (b), which amount shall be covered into the Treasury to the credit of miscellaneous receipts.

Sec. 3. There is hereby authorized to be appropriated from time to time, out of any money in the Treasury not otherwise appropriated, such sums of money as may be necessary to carry out the purposes of this act, not exceeding in the aggregate $165,000,000.

Sec. 4 (a) This act shall not take effect and no authority shall be exercised hereunder and no work shall be begun and no moneys expended on or in connection with the works or structures provided for in this act, and no water rights shall be claimed or initiated hereunder, and no steps shall be taken by the United States or by others to initiate or perfect any claims to the use of water pertinent to such work or structures unless and until (1) the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming shall have ratified the Colorado River Compact, mentioned in section 13 hereof, and the President by public proclamation shall have so declared, or (2) if said States fail to

ratify the said compact within six months from the date of the passage of this act then, until six of said States, including the State of California, shall ratify said compact and shall consent to waive the provisions of the first paragraph of Article XI of said compact, which makes the same binding and obligatory only when approved by each of the seven States signatory thereto, and shall have approved said compact without conditions, save that of such six-State approval, and the President by public proclamation shall have so declared, and, further, until the State of California, by act of its legislature, shall agree irrevocably and unconditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah and Wyoming, as an express covenant and in consideration of the passage of this act, that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this act and all water necessary for the supply of any rights which may now exist, shall not exceed 4,400,000 acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River Compact, plus not more than one-half of any ex-

cess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact.

The States of Arizona, California and Nevada are authorized to enter into an agreement which shall provide (1) that of the the 7,500,000 acre-feet annually apportioned to the lower basin by paragraph (a) of Article III of the Colorado River Compact, there shall be apportioned to the State of Nevada 300,000 acre-feet and to the State of Arizona 2,800,000 acre-feet for exclusive beneficial consumptive use in perpetuity, and (2) that the State of Arizona may annually use one-half of the excess or surplus waters unapportioned by the Colorado River Compact, and (3) that the State of Arizona shall have the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of said State, and (4) that the waters of the Gila River and its tributaries, except return flow after the same enters the Colorado River, shall never be subject to any diminution whatever by any allowance of water which may be made by treaty or otherwise to the United States of Mexico but if, as provided in paragraph (c) of Article III of the Colorado River Compact, it shall become necessary to supply water to the United States of Mexico from waters over and above the quantities which are

surplus as defined by said compact, then the State of California shall and will mutually agree with the State of Arizona to supply, out of the main stream of the Colorado River one-half of any deficiency which must be supplied to Mexico by the lower basin, and (5) that the State of California shall and will further mutually agree with the States of Arizona and Nevada that none of said three States shall withhold water and none shall require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses, and (6) that all of the provisions of said tri-state agreement shall be subject in all particulars to the provisions of the Colorado River Compact, and (7) said agreement to take effect upon the ratification of the Colorado River Compact by Arizona, California and Nevada.

(b) Before any money is appropriated for the construction of said dam or power plant, or any construction work done or contracted for, the Secretary of the Interior shall make provisions for revenues by contract, in accordance with the provisions of this act, adequate in his judgment to insure payment of all expenses of operation and maintenance of said works incurred by the United States and the repayment, within fifty years from the date of the completion of said works, of all amounts advanced to the fund under sub-

division (b) of section 2 for such works, together with interest thereon made reimbursable under this act.

Before any money is appropriated for the construction of said main canal and appurtenant structures to connect the Laguna Dam with the Imperial and Coachella Valleys in California, or any construction work is done upon said canal or contracted for, the Secretary of the Interior shall make provision for revenues, by contract or otherwise, adequate in his judgment to insure payment of all expenses of construction, operation, and maintenance of said main canal and appurtenant structures in the manner provided in the reclamation law.

If during the period of amortization the Secretary of the Interior shall receive revenues in excess of the amount necessary to meet the periodical payments to the United States as provided in the contract, or contracts, executed under this act, then immediately after the settlement of such periodical payments, he shall pay to the State of Arizona 18¾ per centum of such excess revenues and to the State of Nevada 18¾ per centum of such excess revenues.

Sec. 5. That the Secretary of Interior is hereby authorized, under such general reg-

ulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof to such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this act, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this act and the payments to the United States under subdivision (b) of section 4. Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this act. No person shall have or be entitled to have the use for any purpose of water stored as aforesaid except by contract made as herein stated.

After the repayments to the United States of all moneys advanced with interest, charges shall be on such basis and the revenues derived therefrom shall be kept in a separate fund to be expended within the Colo-

rado River Basin as may hereafter be prescribed by the Congress.

General and uniform regulations shall be prescribed by the said Secretary for the awarding of contracts for the sale and delivery of electrical energy, and for renewals under subdivision (b) of this section, and in making such contracts the following shall govern:

(a) No contract for electrical energy or for generation of electrical energy shall be of longer duration than fifty years from the date at which such energy is ready for delivery.

Contracts made pursuant to subdivision (a) of this section shall be made with a view to obtaining reasonable returns and shall contain provisions whereby at the end of fifteen years from the date of their execution and every ten years thereafter, there shall be readjustment of the contract, upon the demand of either party thereto, either upward or downward as to price, as the Secretary of the Interior may find to be justified by competitive conditions at distributing points or competitive centers, and with provisions under which disputes or disagreements as to interpretation or performance of such contract shall be determined either by arbitration or

court proceedings, the Secretary of the Interior being authorized to act for the United States in such readjustments or proceedings.

(b) The holder of any contract for electrical energy not in default thereunder shall be entitled to a renewal thereof upon such terms and conditions as may be authorized or required under the then existing laws and regulations, unless the property of such holder dependent for its usefulness on a continuation of the contract be purchased or acquired and such holder be compensated for damages to its property, used and useful in the transmission and distribution of such electrical energy and not taken, resulting from the termination of the supply.

(c) Contracts for the use of water and necessary privileges for the generation and distribution of hydroelectric energy or for the sale and delivery of electrical energy shall be made with responsible applicants therefor who will pay the price fixed by the said Secretary with a view to meeting the revenue requirements herein provided for. In case of conflicting applications, if any, such conflicts shall be resolved by the said Secretary, after hearing, with due regard to the public interest, and in conformity with the policy expressed in the Federal water power act as to con-

flicting applications for permits and licenses, except that preference to applicants for the use of water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy, or for delivery at the switchboard of a hydroelectric plant, shall be given, first, to a State for the generation or purchase of electric energy for use in the State, and the States of Arizona, California and Nevada shall be given equal opportunity as such applicants.

The rights covered by such preference shall be contracted for by such State within six months after notice by the Secretary of the Interior and to be paid for on the same terms and conditions as may be provided in other similar contracts made by said Secretary: PROVIDED, HOWEVER, That no application of a State or a political subdivision for an allocation of water for power purposes or of electrical energy shall be denied or another application in conflict therewith be granted on the ground that the bond issue of such State or political subdivision, necessary to enable the applicant to utilize such water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy or the electrical energy applied for, has not been authorized or marketed, until after a reasonable time, to be determined

by said Secretary, has been given to such applicant to have such bond issue authorized and marketed.

(d) Any agency receiving a contract for electrical energy equivalent to one hundred thousand firm horsepower, or more, may, when deemed feasible by the said Secretary, from engineering and economic considerations and under general regulations prescribed by him, be required to permit any other agency having contracts hereunder for less than the equivalent of twenty-five thousand firm horsepower, upon application to the Secretary of the Interior made within sixty days from the execution of the contract of the agency the use of whose transmission line is applied for, to participate in the benefits and use of any main transmission line constructed or to be constructed by the former for carrying such energy (not exceeding, however, one-fourth the capacity of such line), upon payment by such other agencies of a reasonable share of the cost of construction, operation, and maintenance thereof.

The use is hereby authorized of such public and reserved lands of the United States as may be necessary or convenient for the construction, operation, and maintenance of

main transmission lines to transmit said electrical energy.

Sec. 6. That the dam and reservoir provided for by section 1 hereof shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River Compact; and third, for power. The title to said dam, reservoir, plant, and incidental works shall forever remain in the United States, and the United States shall, until otherwise provided by Congress, control, manage, and operate the same, except as herein otherwise provided: PROVIDED, HOWEVER, That the Secretary of the Interior may, in his discretion, enter into contracts of lease of a unit or units of any Government-built plant, with right to generate electrical energy, or, alternately, to enter into contracts of lease for the use of water for the generation of electrical energy as herein provided, in either of which events the provisions of section 5 of this act relating to revenue, term, renewals, determination of conflicting applications, and joint use of transmission lines under contracts for the sale of electrical energy, shall apply.

The Secretary of the Interior shall pre-

scribe and enforce rules and regulations, conforming with the requirements of the Federal water power act, so far as applicable, respecting maintenance of works in condition of repair adequate for their efficient operation, maintenance of a system of accounting, control of rates and service in the absence of State regulation or interstate agreement, valuation for rate-making purposes, transfers of contracts, contracts extending beyond the lease period, expropriation of excessive profits, recapture and or emergency use by the United States of property of lessees, and penalties for enforcing regulations made under this act or penalizing failure to comply with such regulations or with the provisions of this act. He shall also conform with other provisions of the Federal water power act and of the rules and regulations of the Federal Power Commission, which have been devised or which may be hereafter devised, for the protection of the investor and consumer.

The Federal Power Commission is hereby directed not to issue or approve any permits or licenses under said Federal water power act upon or affecting the Colorado River or any of its tributaries, except the Gila River, in the States of Colorado, Wyoming, Utah, New Mexico, Nevada, Arizona and California until this

act shall become effective as provided in section 4 herein.

Sec. 7. That the Secretary of the Interior may, in his discretion, when repayments to the United States of all money advanced, with interest, reimbursable hereunder, shall have been made, transfer the title to said canal and appurtenant structures, except the Laguna Dam, and the main canal and appurtenant structures down to and including Syphon Drop, to the districts or other agencies of the United States having a beneficial interest therein in proportion to their respective capital investments under such form of organization as may be acceptable to him. The said districts or other agencies shall have the privilege at any time of utilizing by contract or otherwise such power possibilities as may exist upon said canal, in proportion to their respective contributions or obligations toward the capital cost of said canal and appurtenant structures from and including the diversion works to the point where each respective power plant may be located. The net proceeds from any power development on said canal shall be paid into the fund and credited to said districts or other agencies on their said contracts, in proportion to their rights to develop power, until the districts or other agencies using said canal shall have paid thereby

and under any contract or otherwise an amount of money equivalent to the operation and maintenance expense and cost of construction thereof.

Sec. 8. (a) The United States, its permittees, licensees, and contractees, and all users and appropriators of water stored, diverted, carried, and-or distributed by the reservoir, canals, and other works herein authorized, shall observe and be subject to and controlled by said Colorado River Compact in the construction, management, and operation of said reservoir, canals and other works, and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes, anything in this act to the contrary notwithstanding, and all permits, licenses, and contracts shall so provide.

(b) Also the United States, in constructing, managing, and operating the dam, reservoir, canals, and other works herein authorized, including the appropriation, delivery, and use of water for the generation of power, irrigation, or other uses, and all users of water thus delivered, and all users and appropriators of waters stored by said reservoir and-or carried by said canal, including all permittees and licensees of the United States or any of its agencies, shall observe and be subject to and controlled, anything to the contrary herein

notwithstanding, by the terms of such compact, if any, between the States of Arizona, California and Nevada, or any two thereof, for the equitable division of the benefits, including power, arising from the use of water accruing to said States, subsidiary to and consistent with said Colorado River Compact, which may be negotiated and approved by said States and to which Congress shall give its consent and approval on or before January 1, 1929; and the terms of any such compact concluded between said States and approved and consented to by Congress after said date: PROVIDED, That in the latter case such compact shall be subject to all contracts, if any, made by the Secretary of the Interior under section 5 hereof prior to the date of such approval and consent by Congress.

Sec. 9. That all lands of the United States found by the Secretary of the Interior to be practicable of irrigation and reclamation by the irrigation works authorized herein shall be withdrawn from public entry. Thereafter, at the direction of the Secretary of the Interior such lands shall be opened for entry, in tracts varying in size but not exceeding one hundred and sixty acres, as may be determined by the Secretary of the Interior, in accordance with the provisions of the reclamation law, and any such entryman shall pay an equitable share in

accordance with the benefits received, as determined by the said Secretary, of the construction cost of said canal and appurtenant structures; said payments to be made in such installments and at such times as may be specified by the Secretary of the Interior, in accordance with the provisions of the said reclamation law, and shall constitute revenue from said project and be covered into the fund herein provided for; PROVIDED, That all persons who have served in the United States Army, Navy or Marine Corps during the war with Germany, the war with Spain, or in the suppression of the insurrection in the Philippines, and who have been honorably separated or discharged therefrom or placed in the Regular Army or Navy Reserve, shall have the exclusive preference right for a period of three months to enter said lands, subject, however, to the provisions of subsection (c) of section 4, Act of December 5, 1924 (Forty-third Statutes at Large, p. 702); and also, so far as practicable, preference shall be given to said persons in all construction work authorized by this act: PROVIDED, FURTHER, That in the event such an entry shall be relinquished at any time prior to actual residence upon the land by the entryman for not less than one year, lands so relinquished shall not be subject to entry for a period of sixty days after the

filing and notation of the relinquishment in the local land office, and after the expiration of said sixty-day period such lands shall be open to entry, subject to the preference in this section provided.

Sec. 10. That nothing in this act shall be construed as modifying in any manner the existing contract, dated October 23, 1918, between the United States and the Imperial Irrigation District, providing for a connection with Laguna Dam; but the Secretary of the Interior is authorized to enter into contract or contracts with the said district or other districts, persons, or agencies for the construction, in accordance with this act, of said canal and appurtenant structures, and also for the operation and maintenance thereof, with the consent of the other users.

Sec. 11. That the Secretary of the Interior is hereby authorized to make such studies, surveys, investigations, and do such engineering as may be necessary to determine the lands in the State of Arizona that should be embraced within the boundaries of a reclamation project, heretofore commonly known and hereafter to be known as the Parker-Gila Valley Reclamation Project, and to recommend the most practicable and feasible method of irrigating lands within said project, or units thereof, and the cost of the same; and the ap-

propriation of such sums of money as may be necessary for the aforesaid purposes from time to time is hereby authorized. The Secretary shall report to Congress as soon as practicable, and not later than December 10, 1931, his findings, conclusions and recommendations regarding such project.

Sec. 12. "Political subdivision" or "political subdivisions" as used in this act shall be understood to include any State, irrigation or other district, municipality, or other governmental organization.

"Reclamation law" as used in this act shall be understood to mean that certain act of the Congress of the United States approved June 17, 1902, entitled "An act appropriating the receipts from the sale and disposal of public land in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," and the acts amendatory thereof and supplemental thereto.

"Maintenance" as used herein shall be deemed to include in each instance provision for keeping the works in good operating condition.

"The Federal Water Power Act" as used in this act, shall be understood to mean that certain act of Congress of the United States as approved June 10, 1920, entitled "An act to

create a Federal Power Commission; to provide for the improvement of navigation; the development of water power; the use of the public lands in relation thereto; and to repeal section 18 of the river and harbor appropriation act, approved August 8, 1917, and for other purposes," and the acts amendatory thereof and supplemental thereto.

"Domestic" whenever employed in this act shall include water uses defined as "domestic" in said Colorado River Compact.

Sec. 13. (a) The Colorado River Compact signed at Santa Fe, New Mexico, November 24, 1922, pursuant to act of Congress approved August 19, 1921, entitled "An act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes," is hereby approved by the Congress of the United States, and the provisions of the first paragraph of Article XI of the said Colorado River Compact, making said compact binding and obligatory when it shall have been approved by the legislature of each of the signatory States, are hereby waived, and this approval shall become effective when the State of California and at least five of the other States mentioned, shall have

approved or may hereafter approve said compact as aforesaid and shall consent to such waiver, as herein provided.

(b) The rights of the United States in and to waters of the Colorado River and its tributaries howsoever claimed or acquired, as well as the rights of those claiming under the United States, shall be subject to and controlled by said Colorado River Compact.

(c) Also all patents, grants, contracts, concessions, leases, permits, licenses, rights of way, or other privileges from the United States or under its authority, necessary or convenient for the use of waters of the Colorado River or its tributaries, or for the generation or transmission of electrical energy generated by means of the waters of said river or its tributaries, whether under this act, the Federal water power act, or otherwise, shall be upon the express condition and with the express condition and with the express covenant that the rights of the recipients or holders thereof to waters of the river or its tributaries, for the use of which the same are necessary, convenient or incidental, and the use of the same shall likewise be subject to and controlled by said Colorado River Compact.

(d) The conditions and covenants referred to herein shall be deemed to run with

the land and the right, interest, or privilege therein and water right, and shall attach as a matter of law, whether set out or referred to in the instrument evidencing any such patent, grant, contract, concession, lease, permit, license, right of way, or other privilege from the United States or under its authority, or not, and shall be deemed to be for the benefit of and be available to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, and the users of water therein or thereunder, by way of suit, defense, or otherwise, in any litigation respecting the waters of the Colorado River or its tributaries.

Sec. 14. This act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation and management of the works herein authorized, except as otherwise herein provided.

Sec. 15. The Secretary of the Interior is authorized and directed to make investigation and public reports of the feasibility of projects for irrigation, generation of electric power, and other purposes in the States of Arizona, Nevada, Colorado, New Mexico, Utah, and Wyoming for the purpose of making such information available to said States and to the Congress, and of formulating a comprehensive scheme of control and the improvement

and utilization of the water of the Colorado River and its tributaries. The sum of $250,000 is hereby authorized to be appropriated from said Colorado River Dam fund, created by section 2 of this act, for such purposes.

Sec. 16. In furtherance of any comprehensive plan formulated hereafter for the control, improvement, and utilization of the resources of the Colorado River system and to the end that the project authorized by this act may constitute and be administered as a unit in such control, improvement, and utilization, any commission or commissioner duly authorized under the laws of any ratifying State in that behalf shall have the right to act in an advisory capacity to and in co-operation with the Secretary of the Interior in the exercise of any authority under the provisions of sections 4, 5 and 14 of this act, and shall have at all times access to records of all Federal agencies empowered to act under said sections, and shall be entitled to have copies of said records on request.

Sec. 17. Claims of the United States arising out of any contract authorized by this act shall have priority over all others, secured or unsecured.

Sec. 18. Nothing herein shall be construed as interfering with such rights as the States

now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River Compact or other interstate agreement.

Sec. 19. That the consent of Congress is hereby given to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming to negotiate and enter into compacts or agreements, supplemental to and in conformity with the Colorado River Compact and consistent with this act for a comprehensive plan for the development of the Colorado River and providing for the storage, diversion and use of the waters of said river. Any such compact or agreement may provide for the construction of dams, headworks, and other diversion works or structures for flood control, reclamation, improvement of navigation, diversion of water, or other purposes and-or the construction of power houses or other structures for the purpose of the development of water power and the financing of the same; and for such purposes may authorize the creation of interstate commissions and-or the creation of corporations, authorities, or other instrumentalities.

(a) Such consent is given upon condition

that a representative of the United States, to be appointed by the President, shall participate in the negotiations and shall make report to Congress of the proceedings and of any compact or agreement entered into.

(b) No such compact or agreement shall be binding or obligatory upon any of such States unless and until it has been approved by the legislature of each of such States and by the Congress of the United States.

Sec. 20. Nothing in this act shall be construed as a denial or recognition of any rights, if any, in Mexico to the use of the waters of the Colorado River system.

Sec. 21. That the short title of this act shall be "Boulder Canyon project act."

Approved, December 21, 1928.

(e) That subsequent to the passage of said Boulder Canyon project act the States of California, Colorado, Nevada, New Mexico, Utah and Wyoming waived the provisions of the first paragraph of Article XI of said compact which makes the same binding and obligatory only when approved by the legislatures of the several states signatory thereto, and ratified the Colorado River Compact and agreed that the same should be binding upon its ratification by six States, including the State of California. By said Boulder Canyon project act the Congress of the United States ratified said compact.

(f) That following the enactment of said Boulder Canyon project act and pursuant thereto the State of California by Chapter 16 of the Statutes and Amendments to the Codes of California, 1929, ratified said compact and agreed that it should become binding upon the ratification by five other States, and in addition agreed irrevocably and unconditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah and Wyoming, as an express covenant and in consideration of the said Boulder Canyon project act, that the aggregate consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of said Boulder Canyon project act and all water necessary for the supply of any rights which might then exist, shall not exceed 4,400,000 acre-feet per annum of the waters apportioned to the lower basin States by Paragraph (a) of Article III of the said Colorado River Compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact, which said Chapter 16 of the laws of California of 1929, was and is in words and figures as follows, to-wit:

CHAPTER 16

An Act to limit the use by California of waters of the Colorado River in compliance

with the act of Congress known as the "Boulder Canyon project Act," approved December 21, 1928, in the event the Colorado River Compact is not approved by all of the States signatory thereto. (Approved by the Governor March 4, 1929. In effect August 14, 1929.)

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

Section 1. In the event the Colorado River Compact signed at Santa Fe, New Mexico, November 24, 1922, and approved by and set out at length in that certain act entitled "An act to ratify and approve the Colorado River Compact signed at Santa Fe, New Mexico, November 24, 1922, to repeal conflicting acts and resolutions and directing that notice be given by the governor of such ratifications and approval" approved January 10, 1929, (Statutes 1929 Chapter 1) is not approved within six months from the date of the passage of that certain act of the Congress of the United States known as the "Boulder Canyon project act," approved December 21, 1928, by the legislatures of each of the seven states signatory thereto, as provided by article eleven of the said Colorado River Compact, then when six of said states, including California, shall have ratified and approved said compact, and shall have consented to waive the provisions of the first paragraph of article eleven of said com-

pact which makes the same binding and obligatory when approved by each of the states signatory thereto, and shall have approved said compact without conditions save that of such six states approval and the President by public proclamation shall have so declared as provided by said "Boulder Canyon project act," the State of California as of the date of such proclamation agrees irrevocably and unconditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah and Wyoming as an express covenant and in consideration of the passage of the said "Boulder Canyon project act" that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of said "Boulder Canyon project act" and all water necessary for the supply of any right which may not exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin states by paragraph "a" of article three of the said Colorado River Compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact such uses always to be subject to the terms of said compact.

Sec. 2. By this act the State of California intends to comply with the conditions respecting limitation on the use of water as specified in subdivision 2 of section 4 (a) of the said "Boulder Canyon project act" and this act shall be so construed."

(g) That thereafter and on the 25th day of June, 1929, the President of the United States by public proclamation declared the Boulder Canyon project act effective.

(h) That thereafter Honorable Ray Lyman Wilbur, the then Secretary of the Interior, of the United States, promulgated certain regulations for the delivery of water, on April 23, 1930, which as amended by him on September 28, 1931, were and are in words and figures as follows, to-wit:

GENERAL REGULATIONS

Contracts for the storage of water in Boulder Canyon Reservoir, Boulder Canyon project, and the delivery thereof.

1. No person shall have or be entitled to have the use for any purpose of the water stored in Boulder Canyon Reservoir except by contract made in pursuance of these regulations. All contracts for delivery of water shall be subject to all the terms and provisions of the Colorado River Compact and of the Boulder Canyon project act.

2. The right is reserved to amend or ex-

tend these regulations from time to time consistently with said compact and the laws of Congress, as the public need may require.

3. Storage water in Boulder Canyon Reservoir will be delivered upon such terms and conditions as the Secretary may fix from time to time by regulations and contracts thereunder. Water so contracted for may be delivered at such points on the river as may be agreed upon for irrigation and domestic uses.

4. Contracts respecting water for irrigation and domestic uses shall be for permanent service, and shall conform to paragraph (a) of section 4 of the Boulder Canyon project act.

5. No charge shall be made for water or for the use, storage, or delivery of water for irrigation or for water for potable purposes in the Imperial and Coachella Valleys. Charges otherwise shall be fixed by regulation from time to time. Where water is permitted by the Secretary to be taken from the Colorado River from the reservoir above the Hoover Dam, the utilization of the power plant will be impaired to that extent, and the right is reserved to make a higher charge for water taken above the dam than if delivery is made below the dam.

6. Subject to the provisions of article 7 of these regulations, deliveries of water to users

in California shall be in accordance with the following recommendations of the state division of water resources:

"The waters of the Colorado River available for use within the State of California under the Colorado River Compact and the Boulder Canyon project act shall be apportioned to the respective interests below named and in amounts and with priorities therein named and set forth as follows:

"Section 1. A first priority to Palo Verde Irrigation District for beneficial use exclusively upon lands in said district as it now exists and upon lands between said district and the Colorado River, aggregating (within and without said district) a gross area of 104,500 acres, such waters as may be required by said lands.

"Section 2. A second priority to Yuma project of United States Bureau of Reclamation for beneficial use upon not exceeding a gross area of 25,000 acres of land located in said project in California, such waters as may be required by said lands.

"Section 3. A third priority (a) to Imperial Irrigation District and other lands under or that will be served from the All-American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for

use exclusively on 16,000 acres in that area known as the Lower Palo Verde Mesa, adjacent to Palo Verde Irrigation District, for beneficial consumptive use, 3,850,000 acre-feet of water per annum less the beneficial consumptive use under the priorities designated in sections 1 and 2 above. The rights designated (a) and (b) in this section are equal in priority. The total beneficial consumptive use under priorities stated in sections 1, 2 and 3 of this article shall not exceed 3,850,000 acre-feet of water per annum.

"Section 4. A fourth priority to the Metropolitan Water District of Southern California and-or the City of Los Angeles, for beneficial consumptive use, by themselves and-or others, on the coastal plain of Southern California, 550,000 acre-feet of water per annum.

"Section 5. A fifth priority (a) to the Metropolitan Water District of Southern California, and-or the City of Los Angeles, for beneficial consumptive use, by themselves and-or others, on the coastal plain of Southern California, 550,000 acre-feet of water per annum and (b) to the City of San Diego and-or County of San Diego, for beneficial consumptive use, 112,000 acre-feet of water per annum. The rights designated (a) and (b) in this section are equal priority.

"Section 6. A sixth priority (a) to Imperial Irrigation District and other lands under or that will be served from the All-American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for use exclusively on 16,000 acres in that area known as the Lower Palo Verde Mesa, adjacent to Palo Verde Irrigation District, for beneficial consumptive use, 300,000 acre-feet of water per annum. The rights designated (a) and (b) in this section are equal in priority.

"Section 7. A seventh priority of all remaining water available for use within California, for agricultural use in the Colorado River Basin in California, as said basin is designated on map No. 23000 of the Department of the Interior, Bureau of Reclamation.

"Section 8. So far as the rights of the allottees named above are concerned, the Metropolitan Water District of Southern California and-or the City of Los Angeles shall have the exclusive right to withdraw and divert into its aqueduct any water in Boulder Canyon Reservoir accumulated to the individual credit of said district and-or said city (not exceeding at any one time 4,750,000 acre-feet in the aggregate) by reason of reduced diversions by said district and-or said city; provided, that accumulations shall be subject to such condi-

tions as to accumulation, retention, release, and withdrawal as the Secretary of the Interior may from time to time prescribe in his discretion, and his determination thereof shall be final; provided further, that the United States of America reserves the right to make similar arrangements with users in other States without distinction in priority, and to determine the correlative relations between said district and-or said city and such users resulting therefrom.

"Section 9. In addition, so far as the rights of the allottees named above are concerned, the City of San Diego and-or County of San Diego shall have the exclusive right to withdraw and divert into an aqueduct any water in Boulder Canyon Reservoir accumulated to the individual credit of said city and-or said county (not exceeding at any one time 250,000 acre-feet in the aggregate) by reason of reduced diversions by said city and-or said county; provided, that accumulations shall be subject to such conditions as to accumulation, retention, release and withdrawal as the Secretary of the Interior may from time to time prescribe in his discretion, and his determination thereof shall be final; provided further, that the United States of America reserves the right to make similar arrangements with users in other States without distinction in

priority, and to determine the correlative relations between the said city and-or said county and such users resulting therefrom.

"Section 10. In no event shall the amounts allotted in this agreement to the Metropolitan Water District of Southern California and-or the City of Los Angeles be increased on account of inclusions of a supply for both said district and said city, and either or both may use said apportionments as may be agreed by and between said district and said city.

"Section 11. In no event shall the amounts allotted in this agreement to the City of San Diego and-or to the County of San Diego be increased on account of inclusion of a supply for both said city and said county, and either or both may use said apportionments as may be agreed by and between said city and said county.

"Section 12. The priorities hereinbefore set forth shall be in no wise affected by the relatives dates of water contracts executed by the Secretary of the Interior with the various parties."

7. The Secretary reserves the right to contract with any of the allottees above named in accordance with the above stated recommendation, or, in the event that such recommendation as to Palo Verde Irrigation Dis-

trict is superseded by an agreement between all the above allottees or by a final judicial determination, to contract with the Palo Verde Irrigation District in accordance with such agreement or determination; provided, that priorities numbered fourth and fifth in said recommendation shall not thereby be disturbed.

RAY LYMAN WILBUR,
Secretary of the Interior.

September 28, 1931.

That the Honorable Ray Lyman Wilbur, the then Secretary of the Interior of the United States, entered into a contract with the Imperial Irrigation District of California, dated December 1, 1932, and entered into a contract with the Metropolitan Water District of Southern California, dated April 24, 1930, and amended September 28, 1931, and proposes to enter into contracts with the City of San Diego and with the Palo Verde Irrigation District. That it is provided by the contract made by the Secretary of the Interior with the Imperial Irrigation District of California and by the contract made with the Metropolitan Water District of Southern California, that the United States shall, from the waters of the Colorado River, deliver to users thereof in the State of California, in accordance with the aforesaid regulations, a total of 5,362,000 acre-feet of water per annum.

(i) That the compact suggested by the Boul-

der Canyon Project Act to be entered into between the States of California, Nevada and Arizona has not been made.

(j) That your complainant is reliably informed and believes and, therefore, alleges that Honorable Harold L. Ickes, the present Secretary of the Interior of the United States, recognizes the regulations promulgated by his predecessor in office, Honorable Ray Lyman Wilbur, and the contracts made by his predecessor in office, Honorable Ray Lyman Wilbur, as hereinbefore alleged, to be valid and binding upon the United States and the parties thereto and that said Honorable Harold L. Ickes, the present Secretary of the Interior of the United States, proposes to carry out the terms of said contracts and that the State of California, its political subdivisions and public corporations, parties defendant herein, are making preparations to demand the waters therein contracted to be delivered by the Secretary of the Interior and asserting that said contracts are in all respects binding and valid.

(k) That your complainant is reliably informed and believes and, therefore, alleges that certain of the defendant States and the defendant public corporations of the State of California and Honorable Harold L. Ickes, Secretary of the Interior of the United States, are now claiming and asserting that the true meaning and intent of subdivision (b) of Article III of the Colorado River Compact, here-

inabove set out, is that the waters referred to in said subdivision (b) of Article III of said compact have no reference to the Gila River and its tributaries in Arizona and that the said water was not intended by the framers of said compact, nor by said compact, for the benefit of the State of Arizona and that the contracts made by the Secretary of the Interior of the United States for the use of waters of the Colorado River within the State of California to the amount of 5,362,000 acre-feet per annum thereof relate to and include 4,400,000 acre-feet of water allocated by subdivision (a) of Article III of said compact and 962,000 acre-feet per annum of water allocated by subdivision (b) of Article III of said compact and that said defendants are thereby undertaking to give a meaning to subdivision (b) of Article III of said compact different from that intended by the framers and signers thereof and agreed to by them, and attempting to assert a right to appropriate said one million acre-feet of water per annum from the waters of the Colorado River outside of the State of Arizona so as to interfere with the enjoyment by Arizona, and those claiming under it, of rights already perfected and with the right to make additional legal appropriations and enjoy the same. And the State of California refuses to agree to the exclusion of the Gila River from the limitation imposed on the lower basin by the terms of the Colorado River Compact as suggested by the Boulder Canyon

Project Act and asserts that in addition to the waters contracted, it is entitled to appropriate from the Colorado River one half of the surplus or unappropriated waters thereof, and further asserts contrary to and in violation of the true intent of said compact, Boulder Canyon Project Act and Act of the Legislature of said State, as hereinabove alleged, that in computing the amount of such surplus or unappropriated waters the entire flow of the Gila River shall be added to the flow of the Colorado River.

(l) That the true purpose and meaning of said subdivision (b) of Article III of said compact can be determined and established by the testimony of certain persons present at the time the compact was negotiated and signed, as parties thereto, their advisors, agents and attorneys who were present at their negotiations and the signing of said compact, and who alone know the facts relating to the true construction, meaning and intent of said subdivision (b) of Article III of said Colorado River Compact as hereinabove set forth. It is material and necessary for the protection of the rights of the complainant herein that the testimony of Honorable Herbert Hoover of Palo Alto, California, the representative of the United States at and chairman of the Santa Fe conference which framed the Colorado River Compact; the Honorable Thomas E. Campbell, the then Governor of Arizona, of Prescott, Arizona; Honorable W. S. Norviel of Phoenix, Arizona, who

with former Governor Thomas E. Campbell represented the State of Arizona at said conference; the Honorable Delph E. Carpenter, the representative of the State of Colorado at said conference, now of Greeley, Colorado; the Honorable J. G. Scrugham, the representative of the State of Nevada at said conference, now a member of the Congress of the United States; the Honorable R. E. Caldwell, the representative of the State of Utah at said conference, now of Los Angeles, California; the Honorable C. C. Lewis, the assistant Water Commissioner of the State of Arizona and advisor to W. S. Norviel, who was also present at said conference, now of Phoenix, Arizona, and the Honorable Clarence C. Stetson, who was the executive secretary of said conference, now of Bangor, Maine, and each of them, be taken with respect to the matters and facts herein stated in order that the same may be perpetuated and that equity and justice may be done by, to and among the parties hereto; that the witnesses, hereinbefore named, are, complainant is informed and believes, the only persons now living who participated in said conference, the others participating therein being now deceased.

(m) That such testimony will be material in the anticipated cause and causes of action in determining the true meaning and intent of said Colorado River Compact, said Boulder Project Act and the conditions thereby attached to patents, grants, contracts, concessions, leases, permits, licenses,

rights of way and other privileges from the United States and under its authority, and in determining the true purpose and meaning of the limitation of use in the State of California of waters of said Colorado River imposed by said Boulder Canyon Project Act and the act of the legislature of the State of California, herein set out, and the relative and respective rights of each of the parties hereto in and to the waters of said Colorado River and its tributaries and the use thereof and the burdens and restrictions imposed on such use.

V

That at the time of the filing of this bill to perpetuate testimony, no waters are being taken from the Colorado River system under the contracts hereinabove alleged, and no rights of the State of Arizona have as yet been interfered with and it is not possible for the complainant herein to bring the matters and things herein alleged to an immediate judicial determination and it may be years before any waters are taken from said river under said contracts, or the rights of Arizona therein are interfered with, and all the persons with present knowledge of the present facts may not be available as witnesses when a cause of action shall have accrued to the State of Arizona.

VI

That the witnesses hereinbefore named alone know the facts herein stated and will be material and necessary witnesses in the prosecution of litigation,

which this complainant will be compelled to institute in order to safeguard and protect the right of complainant and those claiming under it to the use of the waters of the Colorado River system and to carry out the true meaning and intent of the act of the legislature of the State of California and of the Boulder Canyon Project Act in limiting the use of the waters of the Colorado River system in said State.

VII

That an original bill, heretofore filed by this complainant in this Court, wherein the State of Arizona was complainant against the states defendant herein, reported in 51 Supreme Court Reporter 522, was dismissed by this Court in the following language:

> "The bill is dismissed without prejudice to an application for relief in case the stored water is used in such a way as to interfere with the enjoyment by Arizona, and those claiming under it, of any rights already perfected or with the right of Arizona to make additional legal appropriations and to enjoy the same."

VIII

Complainant has fully and fairly stated the facts now existing, constituting its cause and causes of action hereinafter to accrue, and what it would expect to prove by the witnesses hereinabove enum-

erated, and complainant is advised by its attorneys herein and, therefore, believes and alleges that it has a good cause of action herein and that an examination and perpetuation of the testimony of the witnesses hereinabove named, is necessary for the protection of the rights of the complainant and those claiming under it. That because the cause and causes of action in which the testimony of the said witnesses is desired cannot be brought immediately to judicial inquiry, complainant is greatly in danger of losing the testimony of said witnesses unless the same be taken and perpetuated in this proceeding, pursuant to the usage, practice and custom of this Court.

WHEREFORE, complainant prays that such process, commission, or commissions and subpoenas as may be necessary for the taking of the oral depositions of said witnesses be issued, executed and returned to this Court to the end that the testimony of the witnesses, hereinabove named, may be preserved and perpetuated in this Court in order that complainant and defendants may use the same, as they may be advised in any and all future litigation concerning the waters of the Colorado River between the parties hereto, as may then be proper.

ARTHUR T. LAPRADE,
Attorney General of the State of Arizona, Solicitor for Complainant.

CHARLES A. CARSON, JR.
A. M. CRAWFORD,
Of Counsel.

STATEMENT AS TO JURISDICTION

Section 2 of Article III of the Constitution of the United States provides that the judicial power shall extend to "all cases in law and equity . . ., to controversies between two or more states . . ." and that "in all cases affecting ambassadors, other public ministers and consuls and those in which a State shall be party, the Supreme Court shall have original jurisdiction."

Paragraph 341, Title 28, of the United States Code provides:

> "The Supreme court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens or between a state and citizens of another state, or aliens, in which latter cases it shall have original, but not exclusive jurisdiction . . ."

No statute has been found concerning the perpetuation of testimony in the Supreme Court, however, Rule 5 of the Revised Rules of the Supreme Court of the United States, effective July 1, 1928, provides:

5

PRACTICE

"This court considers the former practice of the Courts of King's Bench and of Chancery, in England, as affording outlines for the

practice of this court in matters not covered by its rules or decisions, or the laws of Congress."

Under the foregoing constitutional provision and the foreging statute, the Supreme Court exercises exclusive jurisdiction in controversies between States and hence has jurisdiction in this matter.

On account of the foreging rule we have endeavored to follow the English Chancery practice.

Respectfully submitted.

ARTHUR T. LAPRADE,
Attorney General of the State of Arizona, Solicitor for Complainant.

CHARLES A. CARSON, JR.
A. M. CRAWFORD,
Of Counsel.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No.....(Original)

STATE OF ARIZONA

Complainant,

VS.

STATE OF CALIFORNIA, STATE OF COLORADO, STATE OF NEVADA, STATE OF NEW MEXICO, STATE OF UTAH, STATE OF WYOMING, HAROLD L. ICKES, Secretary of the Interior of the United States, PALO VERDE IRRIGATION DISTRICT, a public corporation of the State of California, IMPERIAL IRRIGATION DISTRICT, a public corporation, of the State of California, COACHELLA VALLEY COUNTY WATER DISTRICT, a public corporation of the State of California, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, a public corporation of the State of California, CITY OF LOS ANGELES, a municipal corporation of the State of California, CITY OF SAN DIEGO, a municipal corporation of the State of California, and COUNTY OF SAN DIEGO, a public corporation of the State of California,

Defendants.

BRIEF OF COMPLAINANT STATE OF ARIZONA IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE BILL TO PERPETUATE TESTIMONY AND IN ANSWER TO BRIEFS FILED IN SUPPORT OF OBJECTIONS THERETO

ARTHUR T. LAPRADE,
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BRIEF OF COMPLAINANT STATE OF ARIZONA IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE BILL TO PERPETUATE TESTIMONY AND IN ANSWER TO BRIEFS FILED IN SUPPORT OF OBJECTIONS THERETO

PRELIMINARY STATEMENT

In the above entitled action the Court on the 20th day of February, 1934, issued its rule directing the above named defendants to show cause why complainant's motion for leave to file its bill to perpetuate testimony should not be granted. The rule was made returnable April 2, 1934.

The defendant states of Colorado, Nevada, New Mexico, Utah and Wyoming have filed their response, interposing no objection to the perpetuation of the testimony sought in this action by complainant, State of Arizona, and merely pray that in the event such tesimony is perpetuated, that they, and each of them, may have the right of cross-examination of the witnesses whose testimony may be taken and the right to object to the introduction of the testimony when it may be offered in evidence.

The complainant State of Arizona has no objection to any prayer made by the States of Colorado, Nevada, New Mexico, Utah and Wyoming, not only as applicable to those States, but as applicable to all of the defendants herein.

The response of defendant Harold L. Ickes to the rule to show cause and the brief filed in support of his response and objections to the perpetuation of testimony, raise three questions:

1. Has this Court jurisdiction in a proper case to entertain an original bill to perpetuate testimony?

2. Is the testimony offered here admissable or competent for any of the purposes suggested?

3. Is this in real effect a suit against the United States?

The return to the rule to show cause and the brief filed in support of their objections to the perpetuation of the testimony, as sought by complainant State of Arizona

filed on behalf of defendants Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, State of California, Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego and County of San Diego, raise the same three questions as raised by the response and brief of defendant Harold L. Ickes.

The only objections made therefore to the filing of the bill and the perpetuation of the testimony, as prayed by complainant, are those raised in the one brief by defendant Harold L. Ickes and in the other joint brief by the above named defendants, all of the State of California and which will hereafter be called, for the sake of brevity, "the California defendants", since in this action they raise the same objections in a joint return and brief.

We find no rule of this Court governing procedure in a proceeding of this nature and the Court has made no order and established no rule since the filing of the returns on behalf of the various defendants.

It, of course, is confidently assumed that the Court would not deny complainant's motion for leave to file its bill to perpetuate testimony without an opportunity first having been given to complainant to be heard upon the objections filed by the California defendants and the defendant Harold L. Ickes to the filing of the bill and the perpetuation of the testimony, but since the Court has adjourned until the 30th of April and no order, or rule as to procedure, can be expected before that date, in order to

save time and expedite the matter it has been thought advisable to file this brief on behalf of complainant State of Arizona now, so that if the Court, after reading the briefs and considering the points raised, should have any doubt as to the propriety of granting complainant's motion for leave to file its bill to perpetuate testimony, and as to the propriety of perpetuating the testimony in accordance with the prayer of complainant's bill, the matter might be set down for hearing during the present term of the Court and prior to the summer recess, for the reason that from complainant's view point it is very desirable that the testimony sought to be perpetuated be taken as soon as practicable.

Therefore, the objections made and briefs in support thereof, filed on behalf of defendant Harold L. Ickes and on behalf of the California defendants, will be herein discussed.

QUESTIONS PRESENTED

1. Has this Court jurisdiction, in a proper case, to entertain an original bill to perpetuate testimony?

2. Would the proposed testimony, if perpetuated, be admissible in a later action?

3. Is this in real effect a suit against the United States and is the United States an indispensable party?

SUMMARY OF ARGUMENT

1. This Court has jurisdiction to entertain this, an original bill to perpetuate testimony.

2. The testimony sought to be perpetuated herein will be admissible and competent for the purposes stated in the bill.

3. Since the bill seeks no affirmative relief, but merely the perpetuation of testimony and the perpetuation of the testimony does not in any way impair or involve the property rights of the United States, this is not, strictly speaking, a suit against the United States. Again, by reason of the fact that the Congress of the United States expressly made the limitation imposed upon California of use of the waters of the Colorado River system, irrevocably and unconditionally for the benefit of the State of Arizona, and further provided, that the conditions attached to rights of way and privileges from the United States by that Act were for the benefit of Arizona and available to it by way of suit, defense or otherwise in all litigation respecting the waters of the Colorado River, it would seem that Congress has consented to any suit necessary to enforce the limitation and the conditions attached to rights of way. If in the action to be later brought, the United States should be a necessary party and it should be held that the United States has not yet consented to be sued, still it may well be that by the time the later suit is brought, the United States will have expressly consented to be sued in the action then to be brought.

4. The perpetuation of testimony cannot hurt anyone; it merely will permit an offer to be made in the future action of the testimony herein sought to be perpetuated. At that time the Court, in that action, in view of the pleadings

and issues therein, will undoubtedly consider any objections then raised as to the admissibility of such testimony in evidence in that action.

ARGUMENT

1. Has this Court jurisdiction, in a proper case, to entertain an original bill to perpetuate testimony?

The five states of Colorado, Nevada, New Mexico, Utah and Wyoming raise no question as to the jurisdiction of this Court in this proceeding and in fact raise no objection of any kind to the filing of plaintiff's bill and the perpetuation of the testimony in accordance with the prayer thereof.

The defendant Harold L. Ickes is of the opinion that this Court does have jurisdiction in this cause, that is to say, jurisdiction to entertain an original bill to perpetuate testimony in a proper action.

The California defendants do undertake to raise a question as to the jurisdiction of this Court, but do not go so far as to assert that the Court has no jurisdiction to entertain an original bill to perpetuate testimony and do not cite any authority for the question they thus raise.

The question of jurisdiction is briefly discussed in the statement as to jurisdiction appended to complainant's motion for leave to file its bill to perpetuate testimony. In the brief of defendant Harold L. Ickes that discussion is amplified with the conclusion there reached, stated in

the summary of argument on page 11 of defendant Harold L. Ickes brief in the language:

> "I. The Government is of the opinion that in a proper case this Court has jurisdiction to entertain an original bill to perpetuate testimony."

While this is the first time this jurisdiction has been invoked in this Court, still upon authority of Section 2 of Article 3 of the Constitution of the United States and Paragraph 341, Title 28 of the United States Code, together with the authorities cited in the brief of defendant Harold L. Ickes, it seems clear that this Court has jurisdiction in this cause and that no extended argument as to that is necessary.

2. Would the proposed testimony, if perpetuated, be admissible in a later action?

The Colorado River Compact (Bill p. 14 to 24) has not been ratified by complainant State of Arizona and complainant is not bound thereby. It is suggested on page 17 of defendant Harold L. Ickes' brief that since Arizona has not ratified the compact, she cannot claim thereunder, whatever its true meaning, although this suggestion is later modified on the same page of the brief. Of course the Boulder Canyon Project Act does in substance enact the Colorado River Compact as a law of the United States, and further imposes upon the State of California, for the express benefit of complainant State of Arizona (and the other Colorado River basin states) a limitation upon the use of water of the Colorado River in the State of Cali-

fornia and in defining such limitation, specifically refers back to the provisions of the Colorado River Compact (Boulder Canyon Project Act-Bill p. 30).

The Legislature of the State of California, in accordance with the above cited provision of the Boulder Canyon Project Act, has by Chapter 16 of the Laws of California of 1929, limited forever, irrevocably and unconditionally, and for the benefit of the State of Arizona (and the other Colorado River basin states) the aggregate annual consumptive use of water of and from the Colorado River in the State of California, to not exceeding 4,400,000 acre-feet of the waters apportioned to the lower basin states by paragraph (a) of Article III of the Colorado River Compact, plus not more than one-half of any excess or surplus waters unapportioned by said Compact (Bill p. 55).

The geographical and topographical facts of the lower Colorado River basin make it impossible for the waters of the main stream of the Colorado River, present in the lower basin, to be used anywhere in the United States, except in California and in Arizona. Water, therefore, not used in California is available for use in Arizona and Arizona can put to beneficial use all the water that it can obtain from the main stream of the Colorado River. Therefore, the State of Arizona has a very real interest in the proper construction and enforcement of the limitation on use in the State of California of the waters of the Colorado River, imposed by the Boulder Canyon Project Act and the Act of the Legislature of the State of California, both

of which refer to the language of the Colorado River Compact for definition as to the character and extent of the uses of waters of the Colorado River permitted in California under the limitations imposed upon that use.

As set out in the Bill, page 63, defendant Harold L. Ickes has contracted with California users for delivery of 5,362,000 acre-feet of water per annum from the main stream of the Colorado River for use in the State of California and as stated in the Bill, page 65, defendant Harold L. Ickes and California defendants now assert that all waters heretofore or hereafter contracted to be delivered for use in the State of California in excess of 4,400,000 acre-feet, relate to and comprise, 1. the 1,000,000 acre-feet of water permitted to the lower basin by Article III (b) of the Colorado River Compact, and 2. one-half of the surplus water unapportioned by the Colorado River Compact. In this way the California defendants and the defendant Harold L. Ickes propose to avoid and violate the limitations imposed upon the State of California for the benefit of the complainant State of Arizona by the Boulder Canyon Project Act and the Act of the Legislature of the State of California, hereinabove referred to. In reality they propose to use in California, from the main stream of the Colorado River, 4,400,000 acre-feet of the water apportioned to the lower basin by Article III (a) of the Colorado River Compact (Bill, p. 17), the entire 1,000,000 acre-feet permitted to the lower basin by Article III (b), (Bill, p. 18) and one-half of the very small surplus remaining in the river. The limitation was im-

posed for the benefit of the State of Arizona and the State of Arizona is entitled to enforce that limitation according to its true meaning and intent, and is not to be subjected to any such strained construction as is necessary to permit the California defendants to deprive complainant and those claiming under it of the entire benefit of that limitation.

The Colorado River Compact is not nearly so clear and unambiguous as is argued by defendant Harold L. Ickes and the California defendants. In fact it seems to be apparent upon a consideration of the entire compact that the framers thereof were apportioning waters of the main stream of the Colorado River as at Lee Ferry. It must be borne in mind that all of the tributaries of the upper division, or upper basin, empty into the Colorado River above Lee Ferry and that the records of flow upon which the apportionment of the Colorado River Compact was made, were kept at Lee Ferry. It is the natural dividing point between the upper and lower basins, the point at which the waters of the upper basin have reached the main stream and the point at which record as to the total flow was obtainable at that time and now. The Compact, therefore, in Article III (a) apportions 7,500,000 acre-feet per annum to the upper basin and 7,500,000 acre-feet per annum to the lower basin in perpetuity and in order to assure delivery to the lower basin of the 7,500,000 acre-feet per annum, apportioned to it, provided further in Article III (d) as follows:

> "(d) The States of the upper division will not cause the flow of the river at Lee Ferry to be depleted

> below an aggregate of 75,000,000 acre-feet for any period of 10 consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact."

It is very apparent that the foregoing provision was arrived at by multiplying the 7,500,000 acre-feet per annum, apportioned to the lower basin, by Article III (a), by ten, thus dividing between the upper and lower basins the benefit of flood waters.

If the 1,000,000 acre-feet permitted to the lower basin by Article III (b) of the Compact had been considered to be in the main stream of the Colorado River, then the provision of Article III (d) should have been that the states of the upper division will not cause the flow at Lee Ferry to be depleted below an aggregate of 85,000,000 acre-feet for any period of 10 consecutive years, reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of the compact, otherwise the permission contained in Article III (b) becomes meaningless and valueless for the reason that the upper basin might, without violating any terms of the Compact, prevent its use by withholding the water. This certainly constitutes an ambiguity in the Colorado River Compact, which we submit can be resolved and reconciled only by recognition of the fact that the framers of the Compact intended that the 1,000,000 acre-feet per annum permitted to the lower basin by Article III (b) was not in the main stream at all, but was in the tributaries existing

in the lower basin. In the lower basin there are no tributaries from which water can be obtained for use, except within the State of Arizona and the waters of the tributaries of the State of Arizona, as pointed out in the Bill (pp. 12, 13 and 14) had at that time already been appropriated in large part, and further, entered the Colorado River at a point so far down stream and of such low elevation that it was and is impossible to put the waters thereof to beneficial use in the United States after they reach the main stream of the Colorado River.

Under the construction of the Colorado River Compact and the limitations imposed by the Boulder Canyon Project Act and the Act of the Legislature of the State of California, properly construed as above, California, may, without violating the limitations imposed on it, use from the main stream of the Colorado River, 1. 4,400,000 acre-feet of the 7,500,000 acre-feet apportioned to the lower basin by Article III (a) of the Compact, and 2. not to exceed one-half of the excess or surplus waters of the main stream of the Colorado River unapportioned by the said Colorado River Compact.

Indeed, the construction contended for by Arizona, as above outlined, was never denied or disputed by any of the parties defendant herein, until after the passage of the Boulder Canyon Project Act and until after the Act of the Legislature of the State of California, limiting use within that State, was passed and until after the decision of this Court in the former case of Arizona v. California, 283 U. S. 423. Only after all of these things had occurred, did it

appear to anyone in California or elsewhere, so far as the complainant State of Arizona knows, that it was possible by a strained construction of the Colorado River Compact, the Boulder Canyon Project Act and the Legislative limitation of the Legislature of California, to deny to Arizona and to obtain for California additional water from the main stream of the Colorado River, over and above that permitted by a proper construction and, up to that time, the agreed construction of the Colorado River Compact, the Boulder Canyon Project Act and the Act of the Legislature of the State of California.

Under the construction of that document, as contended for by defendant Harold L. Ickes, and the California defendants herein, California could use from the main stream of the Colorado River, 1. 4,400,000 acre-feet of the 7,500,000 acre-feet apportioned to the lower basin by Article III (a) of the Compact, and 2. 1,000,000 acre-feet permitted to the lower basin by the terms of Article III (b) of the Colorado River Compact, and 3. one-half of the excess or surplus waters, if any, unapportioned by the Colorado River Compact, and further, the California defendants at any rate, and complainant believes defendant Harold L. Ickes, assert that in determining the amount of such surplus or unapportioned waters, the total flow of all Arizona tributaries should be first added to the total flow of the main stream of the Colorado River and that the aggregate flow thus arrived at, in excess of 8,500,000 acre-feet, must be considered surplus or unapportioned waters, one-half of which amount would be subject to ap-

propriation by California from the main stream of the Colorado River. Thus California would seek to get not only the 1,000,000 acre-feet permitted by Article III (b) of the Compact, to which under a proper construction of the Compact she is not entitled, but also in addition would take from the main stream of the Colorado River an amount of water equal to one-half of the total flow of Arizona's tributaries, to which likewise she is not entitled.

The testimony sought to be perpetuated in this proceeding would, therefore, be very clearly admissible and should be considered by this Honorable Court in arriving at the proper construction resolving and reconciling the apparently ambiguous and conflicting provisions of the Colorado River Compact and those imposing upon California the limitations on use to which she is subject by the Boulder Canyon Project Act and the Act of the Legislature of the State of California, according to their true meaning and intent, it being kept in mind that all water present in the main stream of the Colorado River in the lower basin, as defined by the Compact, is susceptible of use in Arizona and can be used nowhere else in the United States, except in Arizona, if not usable in California, and that Arizona has 2,000,000 acres of land which can be irrigated from no other source (Bill, p. 5-6).

Further, it must be pointed out that the Boulder Canyon Project Act no where seeks to deal with the water permitted to the lower basin by Article III (b) of the Compact and in the limitation imposed by that Act upon the State of California, makes no mention of the water per-

mitted by Article III (b) of the Compact. We believe that the proper construction of the Boulder Canyon Project Act and the legislative limitation of the California Legislature imposed on use of the water of the Colorado River system in California, even aside and apart from the testimony herein sought to be perpetuated, indicates that it was never intended either by Congress or the California Legislature that any person in California would ever claim the right to use any portion of the 1,000,000 acre-feet permitted to the lower basin by Article III (b) of the Compact, else permission to do so would have been incorporated in the Boulder Canyon Project Act and in the Act of the Legislature of the State of California.

It is conceded in the brief filed on behalf of defendant Harold L. Ickes that an ambiguity exists in the Boulder Canyon Project Act (p. 18 of brief) as to what waters are included in the limitation upon use in California, of excess or surplus unapportioned by said Compact. That ambiguity can be resolved by the testimony herein sought to be perpetuated, together with further evidence to show that the apparent ambiguity of the Boulder Canyon Project Act was occasioned by the fact that the Congress of the United States recognized and gave effect to the intent and purpose of the framers of the Compact as set forth in complainant's bill. This, complainant hopes to be able to show by competent, relevant and material evidence from the proceedings of the Congressional Committees which considered the Boulder Canyon Project Act and the legislative history of that Act.

The testimony herein sought to be perpetuated concerns an agreement from which arise all of the ambiguities and misunderstandings of the Colorado River Compact, the Boulder Canyon Project Act and the Act of the Legislature of the State of California. Certainly it is material to show the initiation and the reason for the apparent ambiguities and uncertainties of these various documents and complainant, State of Arizona, hopes and believes that it will be able to thus show that the reason no mention is made in the Boulder Canyon Project Act of the 1,000,000 acre-feet permitted to the lower basin by Article III (b) of the Compact, is because Congress considered the 1,000,000 acre-feet permitted by Article III (b) to be in Arizona tributaries for the sole and exclusive benefit of the State of Arizona, in accordance with the understanding, agreement, intent and purpose of the framers of the Colorado River Compact, as set forth in the Bill to perpetuate testimony herein.

That Congress so intended is indicated by the provisions of the Boulder Canyon Project Act itself, Section 4 (A) thereof (Bill, pp. 27, 28, 29, 30) in which Congress authorized a compact between California and Arizona, which should provide among other things:

> "(3) That the State of Arizona shall have the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of said State, and (4) that the waters of the Gila River and its tributaries, except return flow after the same enters the Colorado River, shall never be subject to any dimin-

ution whatever by any allowance of water which may be made by treaty or otherwise to the United States of Mexico, but if, as provided in paragraph (c) of Article III of the Colorado River Compact, it shall become necessary to supply water to the United States of Mexico from waters over and above the quantities which are surplus as defined by said compact, then the State of California shall and will mutually agree with the State of Arizona to supply, out of the main stream of the Colorado River one-half of any deficiency which must be supplied to Mexico by the lower basin."

It was thus clearly indicated by Congress in the very language of the Boulder Canyon Project Act itself, that it intended that the waters of Arizona tributaries should be forever for exclusive beneficial consumptive use within the State of Arizona. Thus, in this portion of the Boulder Canyon Project Act effect was given to the understanding, agreement, intent and purpose of the framers of the Colorado River Compact, as set forth in the Bill, in connection with the 1,000,000 acre-feet per annum permitted to the lower basin by Article III (b) of the Colorado River Compact. The complainant State of Arizona hopes to be able to show in the case hereafter to be brought by it, by competent, relevant and material evidence of the hearings and reports of the Congressional Committees and statements made in Congress and the legislative history of the Act, that it was the intent of Congress to impose a limitation on California by the terms of the Boulder Canyon Project Act of 4,400,000 acre-feet of the water apportioned by

Article III (a) of the Compact, plus one-half of the surplus or unapportioned waters of the main stream of the Colorado River, thereby saving to Arizona its tributaries and the 1,000,000 acre-feet per annum therefrom permitted by the understanding, of which testimony is sought to be perpetuated and assuring to Arizona and those claiming under it the right to appropriate one-half of the surplus or unapportioned waters of the main stream present in the lower basin for use, in excess of the 7,500,000 acre-feet apportioned to the lower basin by Article III (a) of the Colorado River Compact.

Certainly the testimony sought to be perpetuated concerning the agreement, understanding, purpose or intent of the framers of the Colorado River Compact becomes very material in explaining and resolving the apparent ambiguities and conflicting language of the Colorado River Compact, of the Boulder Canyon Project Act and the Act of the Legislature of the State of California.

These ambiguities and inconsistencies claimed by California defendants and defendant Harold L. Ickes to bear no relation to the understanding, agreement, intent and purpose of the framers of the Colorado River Compact, of which Arizona desires testimony perpetuated, can be logically explained by no other means and in no other way than by showing the understanding, agreement, purpose and intent of the framers of the Colorado River Compact and by showing that in enacting the Boulder Canyon Project Act, Congress gave effect and intended to give effect to that understanding, agreement, intent and purpose.

The Act of the Legislature of the State of California follows exactly, as to the limitation imposed upon use of waters of the Colorado River system within the State of California, the language of the Boulder Canyon Project Act and makes no reference whatsoever to Article III (b) of the Colorado River Compact.

The omissions, ambiguities and conflicting provisions of the Colorado River Compact, the Boulder Canyon Project Act and the Act of the Legislature of the State of California, as hereinabove pointed out, can be explained, resolved and reconciled in no other way, except that they were drawn in accordance with and in order to give effect to the understanding, agreement, purpose and intent of the framers of the Colorado River Compact, of which Arizona desires the testimony to be perpetuated in this proceeding, and the complainant State of Arizona hopes to be able to connect all of the matters hereinbefore referred to, so as to make all of the evidence, including the testimony sought to be perpetuated, admissible in an action to be later brought.

The proper construction of the Colorado River Compact, the Boulder Canyon Project Act and the Act of the Legislature of the State of California in limiting the use of water within California, will likewise be material in construing and judicially determining the proper construction of conditions attached to rights of way and privileges from the Federal Government in aid of appropriation and use of water from the Colorado River system, which conditions were attached by Section 13 (b), (c) and (d) of the Bould-

er Canyon Project Act (Bill, pp. 48-49) and as pointed out above, such testimony will be very material in actions to be hereafter brought concerning priority of appropriation and right of appropriation and use of waters from the Colorado River and the relative rights of users thereof in Arizona and in California.

Where in the application of a contract to its subject matter, an ambiguity or uncertainty arises which cannot be removed by an examination of the agreement alone, parol evidence of the circumstances under which it was made and of statements made in the negotiations which preceded may be admitted to resolve the ambiguity and to prove the real intention of the parties.

Kilby Mfg. Co. v. Hinchman-Reuton Fire Proofing Co. 132 Fed. 957 (C. C. A.)

Lonergan v. Buford, 148 U. S. 581.

A writing should be construed with reference to the actual state of the subject matter at the time of its execution and for that purpose extrinsic evidence may be admitted to place the Court or jury in the position of the parties at the time of executing the instrument and thus enable them intelligently to interpret the language used.

West v. Smith, 101 U. S. 263,

Walker v. Brown, 165 U. S. 654,

Runkle v. Burnham, 153 U. S. 216.

The inducing causes leading up to the execution of a written instrument may also be shown to aid in its con-

struction where its phraseology is doubtful or ambiguous.

22 C. J. 1182,

Shellberg v. McMahon, 98 Kans. 46, 157 Pac. 268.

It is very generally held that the negotiations between the parties prior to the execution of a contract or other writing may be admissible for the purpose of aiding the court in the interpretation of the written instrument.

22 C. J. 1183.

It has been well said,

> "In other words the Court was of opinion that the condition of the bond was open to interpretation and that it was its duty, in order to decide upon its meaning, to look not only to the language employed, but to the subject matter and surrounding circumstances. This was in accordance with the rule declared by the Supreme Court in Barreda v. Silsbie, 21 How. 146, 16 L. Ed. 86; Nash v. Towne, 5 Wall. 689, 18 L. Ed. 527; Canal Co. v. Hill, 15 Wall. 94, 21 L. Ed. 64; Mobile & Montgomery R. Co. v. Jurey, 111 U. S. 584, 592, 4 Sup. Ct. 566, 28 L. Ed. 527. We are of the opinion that this evidence was properly admitted."

Findley v. United States, 225 Fed. 337 (C. C. A.)

Again, parol evidence is admissible to show the situation of the parties and the circumstances under which a written instrument was executed for the purpose of ascertaining the intentions of the parties and properly construing the writing.

22 C. J. 1186,

U. S. v. Bethlehem Steel Co., 205 U. S. 105,

Merriam v. U. S., 107 U. S. 437.

Parol or extrinsic evidence of the understanding of the parties in respect to the construction of a written instrument is usually held admissible to explain that which would otherwise be ambiguous and for this purpose evidence of declarations of a party made previous to or at the time of signing the contract is admissible.

22 C. J. 1190,

Fairbanks Morse & Co. v. Nelson, 217 Fed. 218 (C. C. A.)

In view of the foregoing authorities and in view of the varied and great questions to be raised in litigation hereafter, growing out of the Colorado River Compact, the Boulder Canyon Project Act and the legislative limitation on use in the State of California, who can say that the testimony herein sought to be perpetuated will not be admissible? It is respectfully submitted that to perpetuate the testimony does no more than to preserve it so that it may be offered in evidence; that at the time it is offered in evidence the Court will, in view of the pleadings in the then case, consider and rule upon the question of its admissibility.

3. Is this in real effect a suit against the United States and is the United States an indispensable party?

On this question the brief filed on behalf of defendant Harold L. Ickes does not seek to maintain the position

that the present action is a suit against the United States, but seeks to say that the action to be later brought by complainant State of Arizona will necessarily be one against the United States and that, therefore, this present proceeding should be considered an action against the United States, which the complainant State of Arizona cannot maintain because no consent has been given by the United States to be sued in an action seeking to perpetuate testimony.

This seems to be a very specious argument since no relief is prayed as against the United States, it is difficult to see how any consent would be necessary for the maintenance of this action. It may well be that in the event the United States should be a necessary party to the later action to be brought by complainant, consent will have been given by that time by the United States to be sued in such action, so that the point is not now properly before this Court. The testimony certainly, as hereinabove pointed out, will be material in determining the extent of the limitation imposed upon California and the priority of use by the users of the water in Arizona and those in California. To such action it is clear the United States will not necessarily be a party. Again, it is specifically provided by Section 4 (a) of the Boulder Canyon Project Act (Bill, p. 30) that that act should not take effect "until the State of California, by act of its legislature shall agree irrevocably and unconditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah and Wyoming, as an express

covenant and in consideration of the passage of this act, that the aggregate annual consumption use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this act and all water necessary for the supply of any rights which may now exist, shall not exceed 4,400,000 acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River Compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact." And again, in Section 13, paragraph (d), in attaching conditions and covenants running with the land to rights of way and privileges from the United States, it is provided that such conditions and covenants "shall be deemed to be for the benefit of and be available to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming, and the users of water therein or thereunder, by way of suit, defense, or otherwise, in any litigation respecting the waters of the Colorado River or its tributaries." (Bill, p. 49).

It will be borne in mind that the conditions and covenants referred to make all rights of way and privileges from the United States subject to the terms of the Colorado River Compact, and that all of the water contracted to be delivered in California, together with the rights of way therefor across Federal lands, as well as water to be appropriated in the State of Arizona and in the other states of the Colorado River basin, are expressly made

subject to the terms of the Colorado River Compact, and that it is expressly provided that such conditions and covenants are for the benefit of the respective States and available by way of suit, defense or otherwise in litigation respecting the waters of the Colorado River or its tributaries.

If any consent by the United States should be held to be necessary, even for the purpose of maintaining a later action, it seems clear that by these provisions of the Boulder Canyon Project Act, Congress has so consented.

However, it seems probable that this position taken by defendant Harold L. Ickes, is due to a misapprehension appearing on page 9 of his brief in which the statement is made, "The former Secretary of the Interior promulgated certain regulations for the delivery of water (Bill, pp. 56-63) and entered into certain contracts, calling for delivery to users in the State of California of 5,362,000 acre-feet per year (p. 63). This exceeds California's original assignment of the Article III (a) waters by 962,000 acre-feet. Arizona thinks that this excess must come from the 1,000,000 acre-feet of Article III (b), which she says belongs to her (p. 65)".

The complainant State of Arizona alleges that defendant Harold L. Ickes and the California defendants assert that the 962,000 acre-feet relate to and include the water permitted to the lower basin by Article III (b) and that this assertion by defendant Harold L. Ickes and the California defendants is erroneous. The State of Arizona, complainant herein, makes no such contention. On the

contrary, the complainant State of Arizona insists that it can include no part of the water permitted to it by Article III (b) of the Compact, none of which is present in the main stream of the Colorado River at all, and all of which is in the tributaries of the State of Arizona for use within the State of Arizona. The State of Arizona contends that the 962,000 acre-feet referred to in the foregoing quotation is and must be held to be a charge against the one-half of the surplus or waters unapportioned by the Colorado River Compact, permitted to California by its limitation and must be charged against California's permitted surplus, or one-half of such waters.

It certainly will not be contended by the defendant Harold L. Ickes in order to defeat this, or any other action, that he is empowered to make contracts in violation of the Boulder Canyon Project Act and the Congressional limitation therein contained upon use within the State of California, whereby he would nullify and vitiate the limitation placed upon California by that Act, which limitation was expressly made for the benefit of complainant State of Arizona, and that in an action brought by the State of Arizona to enforce that limitation that he could defeat that action upon the ground that the United States was a necessary party thereto, much less is there any logic in the position that this action to perpetuate testimony, with no affirmative relief prayed at all, should be construed as an action against the United States, or one involving its property interests or rights.

The cases cited to this point in behalf of defendant Harold L. Ickes and in the brief of the California defendants, are not in point and no authority is cited in this, or any other Court, in which it was held that a bill to perpetuate testimony would not be entertained because perchance in some future action, in which it might be offered in evidence, it would be necessary to join the soverign as a defendant. It may be necessary, or it may not be necessary, but in either event the mere perpetuation of the testimony calls into question no property right of the United States which could only be effected, if at all, in a later action.

On page 34 of the brief of the California defendants, it is urged that the United States is an indispensable party to this action, to any future action that might be brought and that, therefore, the testimony should not be preserved for offering in any action involving the question of priority of use by the Arizona users of water and California users of water, or otherwise. In other words, the argument on this point by the California defendants and by defendant Harold L. Ickes is that while the limitation imposed upon California's use of waters from the Colorado River is made unconditionally and irrevocably in the language of Congress and in the language of the Act of the Legislature of California, for the benefit of the State of Arizona (and the other basin states) still Arizona cannot enforce that limitation or claim the benefit thereof because in order to do so, the United States would be an indispensable party and the United States has not consented to be sued. Defendant Harold L. Ickes and the

California defendants would thus avoid the Act of Congress of the United States and the Act of the Legislature of the State of California and deny to Arizona the benefit of the protection of that limitation, although in terms it was made for the benefit of Arizona by the Congress of the United States.

We submit that none of the defendants can violate, vitiate or nullify that limitation, contrary to the will of the Congress of the United States and defeat the jurisdiction of this Court to determine the correct construction of that limitation by claiming that such action would necessarily constitute a suit against the United States without its consent.

On pages 31 and 32 of the brief of the California defendants, an argument is attempted to the effect that the mere perpetuation of the testimony herein sought by complainant State of Arizona, would do great harm.

We submit that in its order for the taking of the testimony the Court may very properly reserve to defendants the right to object to the reception in evidence of the testimony sought to be perpetuated, at the time and in whatever tribunal or tribunals it may be offered in evidence in a later action or actions and that the mere perpetuation of the testimony can do no harm.

It is apparent that the defendant Harold L. Ickes and the California defendants herein are by their objections and briefs trying to prevent the mere offer in evidence of

the testimony herein sought to be perpetuated, upon the theory that if it is not now perpetuated it will be lost to complainant State of Arizona and it will be impossible to ever present the question of its admissibility to this, or any other Court.

The result to be accomplished by the perpetuation of the testimony is to secure to complainant and other parties in this action the right to offer in evidence the testimony herein sought to be perpetuated subject to a then ruling as to its admissibility under the pleadings in an action in this Court to be later brought.

We submit also that an order for the perpetuation of this testimony will not be construed by any Court as a ruling that it is admissible in evidence in any action to be later brought by the parties hereto, and that the mere perpetuation of the testimony will not create any unwarranted doubt or cloud to the detriment of any of the parties to this action.

We also submit that the perpetuation of the testimony, which may become material, is in the best interests of justice and fair dealing between the parties to this action; that the refusal to perpetuate the testimony would forever render it impossible for any Court to pass upon its admissibility in any subsequent action and thus the refusal to perpetuate the testimony would defeat justice rather than promote it.

CONCLUSION

In conclusion we agree with and adopt the statement on page 20 of the brief of defendant Harold L. Ickes, as follows: "That case will not depend on any legalistic claim on either side, but on the provisions of the controlling legislation and the consideration of equal and fair dealing between States, and actual beneficial uses of the water, which this Court has applied in all these cases."

This quotation refers to the case to be brought in the future by the complainant State of Arizona as to priority of use of water, as to conditions attached to rights of way and as to relative rights to appropriate water and as to the proper construction of the limitation placed on California. With the statement made the complainant is in entire accord and in order to properly construe "the provisions of the controlling legislation" and in order to bring to this Court evidence which will aid it in determining "the consideration of equal and fair dealing between States", we respectfully submit that the motion for leave to file bill to perpetuate testimony should be granted and that the testimony should be ordered taken at the earliest practicable moment.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1933

No. (Original)

STATE OF ARIZONA,
Complainant,

vs.

STATE OF CALIFORNIA ET AL.,
Defendants,

BRIEF ON BEHALF OF THE STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT AND CITY OF LOS ANGELES, IN REPLY TO BRIEF OF THE STATE OF ARIZONA.

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QUESTIONS PRESENTED

1. Has this court jurisdiction to entertain an original bill to perpetuate testimony?

2. Would the proposed testimony, if taken, be admissible for any purpose suggested by the complainant?

3. Is the United States, which has not consented to be sued, an indispensable party?

CONSTITUTION AND STATUTES INVOLVED

Constitution of the United States, Article III, section 2, clauses 1 and 2.

Tenth Amendment to the Constitution of the United States.

Eleventh Amendment to the Constitution of the United States.

The Boulder Canyon Project Act, approved December 21, 1928, c. 42, 45 Stat. 1057-1067. This act appears in full in the bill, pp. 25-52.

The Colorado River Compact, authorized by the act of August 19, 1931, c. 72, 42 Stat. 171, signed at Santa Fe, New Mexico, November 24, 1922, and approved by the Boulder Canyon Project Act, *supra*. The Compact appears in full in the bill, 14-24.

An act of the California Legislature entitled "An act to limit the use by California of waters of the Colorado River in compliance with the act of Congress known as the 'Boulder Canyon Project Act,' approved December 21, 1928, in the event the Colorado River Compact is not approved by all of the States signatory thereto," approved by the Governor March 4, 1929, California Stats. 1929, p. 38, c. 16. This act appears in full in the bill, pp. 54-56.

SUMMARY OF ARGUMENT

I

The question of jurisdiction may be open to doubt.

II

The testimony sought would be inadmissible in any suit or proceeding.

1. Article III (b), for the construction of which the testimony is sought, is clear and unambiguous. Ambiguities in other portions of the Compact, if any, are irrelevant.

2. The Compact, being a statute, cannot be construed by parol evidence.

3. The Compact is a contract between States, not negotiators, and the intent of the negotiators, undisclosed to the Legislatures, cannot be material.

4. To order the taking of inadmissible testimony would be harmful.

III

The United States is an indispensable party and has not consented to be sued.

ARGUMENT

I

THE JURISDICTION

Arizona, in her brief (p. 7), states that this is the first time this jurisdiction has been invoked in this court. This fact alone makes an inquiry

as to jurisdiction highly pertinent. As said by this court in *Rhode Island* vs. *Massachusetts,* 12 Peters 657, 717:

> "However late this objection has been made, or may be made in any cause, in an inferior or appellate court of the United States, it must be considered and decided, before any court can move one further step in the case; as any movement is necessarily the exercise of jurisdiction."

It will be remembered that by the tenth amendment to the Constitution "The powers not delegated * * * are reserved to the States, respectively, or to the people." This has particularly been held to apply to the rights of sovereignty which the States possessed before the adoption of the Constitution of the United States. One of the rights or attributes of sovereignty has always been immunity from suit without the consent of the sovereign.

A limited consent has been given by Article III, Sec. 2 of the Constitution. The States there consented to the exercise of the Federal judicial power in "* * * controversies between two or more States * * *"

Again, as said by the court in *Rhode Island* vs. *Massachusetts, supra,* at page 719:

> "* * * But as this court is one of limited and special original jurisdiction, its action must be confined to the particular cases, controversies, and parties over which the Constitution and laws have authorized it to act; * * *"

Each State has consented to suit (in this connection) only where there is a controversy between itself and one or more other States.

This leads to the inquiry suggested in our opening brief (p. 18) whether or not this limited consent, on the part of the State, embraces a proceeding in which there is no present controversy and the exact nature of the future controversy is not known and indeed it is not definitely known that there will ever be a controversy. Under the Constitution, for this court to exercise original jurisdiction in a matter between States there must be a controversy.

The first clause of section 2 of Article III, embracing all cases in law and equity arising under the Constitution and laws of the United States, does not confer jurisdiction where a State is a party.

Hans vs. *Louisania,* 134 U. S. 1;
North Carolina vs. *Temple,* 134 U. S. 22.

See

XIth Amendment to Constitution of the United States.

II

THE TESTIMONY SOUGHT WOULD NOT BE ADMISSIBLE IN ANY PROCEEDING UPON ANY OF THE ALLEGED ISSUES REFERRED TO IN THE PROPOSED BILL

The reasons why the proposed testimony would not be admissible in any suit which Arizona may

bring are fully presented and supported by authority in the opening brief filed by the California defendants.

Arizona's brief does not meet the issues raised by the California brief on this subject. The testimony sought relates solely to the "meaning and intent" of Article III (b) of the Compact. (California's opening brief, p. 8.) The California defendants showed in their brief: (1) That Article III (b) is in no respect ambiguous or uncertain, and therefore is not open to construction; (2) That the Compact is a statute and a treaty and, even if found to be open to construction, cannot be construed by the aid of parol evidence; (3) That the "meaning and intent" ascribed by Arizona to Article III (b) and the alleged agreement to make a supplemental compact, which are alleged to be known only to the negotiators who met at Santa Fe, therefore, were never disclosed to Congress nor to the Legislatures of the States, who were the contracting parties. They cannot, therefore, be admissible in evidence to determine the intent of the contracting parties.

Arizona does not directly or indirectly refute any of these propositions.

1. ARTICLE III (b) IS PLAIN AND UNAMBIGUOUS AND IS THEREFORE NOT OPEN TO CONSTRUCTION.

Although she claims, by generalized allegations and conclusions of law, that the "meaning and intent" ascribed by the Secretary of the Interior

and certain other defendants to Article III (b) of the Compact are erroneous, Arizona does not in her bill attempt to show that Article III (b) is in any respect ambiguous or uncertain. In fact, it affirmatively appears from the allegations on pages 12 and 13 of the bill that all the negotiators understood precisely what the language of Article III (b) meant, since it is alleged that "* * * it was agreed that in view of the fact that no appropriation or allocation of water had otherwise been made by said Compact directly to any State, the one million acre-feet for the State of Arizona should be included in said Compact *by an allocation for the Lower Basin.*" (Italics supplied.) In no particular has Arizona, either in the bill or in her brief, pointed out any ambiguity in Article III (b).

What Arizona has endeavored to do in her brief is to point out what she considers to be inconsistencies, contradictions, omissions, and uncertainties in other parts of the Compact than Article III (b) and in the Boulder Canyon Project Act and the California Limitation Act. Parenthetically, analysis shows that the alleged uncertainties do not exist. Whether such uncertainties exist or not is immaterial to the present inquiry. The testimony sought to be taken relates solely, as alleged by Arizona, to the meaning and intent of Article III (b). (Bill, 10-13, 14, 64, 65, 66, 68.)

As shown in the opening brief of the California defendants, the terms of Article III (b) are plain and unmistakable. It states:

"(b) In addition to the apportionment in paragraph (a), the *Lower Basin* is hereby given the right to increase its beneficial consumptive use of such waters by 1,000,000 acre-feet per annum." (Italics supplied.)

The term "Lower Basin" is explicitly and plainly defined in Article II (g). Under this definition there is no room for construction or interpretation by which Article III (b) could be so altered as to substitute the term "Arizona" for the term "Lower Basin."

Since there is no uncertainty nor ambiguity in Article III (b), there is no room for construction, whether the Compact is regarded as an ordinary contract, or as a treaty or statute.

2. THE COLORADO RIVER COMPACT IS A STATUTE AND THE RULES OF STATUTORY CONSTRUCTION MUST PREVAIL

The Colorado River Compact constitutes both a treaty and a statute. (California's opening brief, pp. 20-29.) Even if the Compact were found to be open to construction, it cannot, under familiar rules of statutory construction, be construed by the aid of parol evidence. The authorities submitted in this regard have not been challenged by Arizona. While this is, perhaps, the most conclusive element in this proceeding, it is not mentioned in her brief. She does cite (brief, pp. 20-22) a number of cases to the general effect that where ambiguity or uncertainty exists in an ordinary contract, which

ot be removed by examination of the agreement , parol evidence of the circumstances existing e time the contract was made, the state of the ct matter, etc., may be admissible. If these are properly applied to the subjects to which relate, these defendants have no quarrel with . None of them relate to construction of a y or statute. Even if the Compact were ded simply as a contract, still it is not a con- between the negotiators who met at Santa it is a contract between sovereign States, oved by the United States. No like situation own in any of Arizona's authorities. Accord- , Arizona's authorities have no relevancy to natter before this court.

THE COMPACT IS BETWEEN THE SEVERAL STATES AND THE UNITED STATES, AND NOT BETWEEN THE NEGOTIATORS.

e discussions, understandings and alleged ement referred to in the bill are alleged to been had between the negotiators representing even States. These negotiators had no power ind the States. They did not execute nor orize the Compact. That was done by the slatures of the six States which ratified it and the Congress. The "meaning and intent" bed by Arizona to Article III (b) and the ed agreement to make a supplemental compact alleged to be known only to the negotiators met at Santa Fe. (Bill pp. 66-67.) They were

not, therefore, disclosed to Congress nor to the Legislatures. By no process of reasoning could these oral discussions and negotiations of the negotiators at Santa Fe in 1922 be used to explain or construe the Boulder Canyon Project Act adopted by Congress in 1928, nor the acts of the California Legislature, adopted in 1929. If the intent of the Compact is in question, it is the intent of the United States and of the six States, the contracting parties, represented by their responsible agents, the Congress and the six Legislatures.

4. AN ORDER TO TAKE THE TESTIMONY SOUGHT WOULD BE HARMFUL

Arizona claims (brief p. 5) that "The perpetuation of testimony cannot hurt anyone; it will merely permit an offer to be made in the future action of the testimony herein sought to be perpetuated."

This court will not order the doing of an idle act simply to the end that obviously inadmissible testimony may be offered in some future proceeding. The California defendants pointed out in their opening brief (p. 31) how this inadmissible and improper testimony would be harmful. The Colorado River Compact is designed to stabilize water rights on the river. Water, in these arid Western States, is of transcendent importance. By the approval of the Compact it was thought that these States could live together in peace and harmony so

far as water rights on the Colorado are involved. The testimony which Arizona seeks to have perpetuated is allegedly for the purpose of showing in some future action that the Compact does not mean what it plainly says. For this very reason, the taking of the testimony would tend to cast a doubt upon the Compact which would remain unsolved until that future day when the testimony is offered and passed upon by the court. In the meantime all of the great enterprises dependent upon the Compact will be laboring under a cloud of uncertainty.

III

THE UNITED STATES IS AN INDISPENSABLE PARTY

These defendants deem that the argument on this point has been adequately presented in the opening brief of California defendants.

Respectfully submitted.

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o

No. (Original)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

STATE OF ARIZONA, *Complainant,*

v.

STATE OF CALIFORNIA, ET AL., *Defendants.*

RETURN ON BEHALF OF THE STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, AND COUNTY OF SAN DIEGO TO THE RULE TO SHOW CAUSE DATED FEBRUARY 20, 1934,

AND

BRIEF IN SUPPORT OF RETURN TO THE RULE.

I. W. STEWART,
ARVIN B. SHAW, JR.,
for Palo Verde Irrigation District.
CHAS. L. CHILDERS,
for Imperial Irrigation District.
I. W. STEWART,
ARVIN B. SHAW, JR.,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. ORIGINAL

STATE OF ARIZONA, *Complainant,*

v.

STATE OF CALIFORNIA, ET AL., *Defendants.*

RETURN TO RULE TO SHOW CAUSE.

The defendants, the State of California, Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, The Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego, and County of San Diego, responding to the Court's Rule to Show Cause dated February 20, 1934, subject to the motion of the State of Arizona for leave to file its bill to perpetuate testimony, for the reasons following:

1. The bill sought to be filed shows on its face that the proposed testimony would not be admissible in evidence; this Court should not compel the taking of such testimony, and the defendants should not be burdened by the taking of it.

2. The bill sought to be filed shows on its face that the United States is an indispensable party, and the bill should not be received in the absence of consent of the United States to be sued.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933.

NO. (ORIGINAL)

STATE OF ARIZONA, *Complainant,*

v.

STATE OF CALIFORNIA, ET AL., *Defendants.*

BRIEF OF THE STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, AND COUNTY OF SAN DIEGO,

IN SUPPORT OF THEIR RETURN TO THE RULE.

JURISDICTION.

This is an original action by a State, asserting jurisdiction under the Constitution of the United States, Article III, section 2, clauses 1 and 2 (bill, p. 71), and United States Code, Title 28, paragraph 341. Rule 5 of this Court is cited (bill, p. 71). The complainant's motion for leave to file a bill to perpetuate testimony was submitted February 14, 1934. The rule to show cause issued February 20, returnable April 2, 1934.

QUESTIONS PRESENTED.

1. Has this Court jurisdiction to entertain an original bill to perpetuate testimony?

2. Would the proposed testimony, if taken, be admissible for any purpose suggested by the complainant?

3. Is the United States, which has not consented to be sued, an indispensable party?

CONSTITUTION AND STATUTES INVOLVED.

Constitution of the United States, Article III, section 2, clauses 1 and 2.

United States Code, Title 28, Section 341.

The Boulder Canyon Project Act, approved December 21, 1928, c. 42, 45 Stat. 1057-1067. This Act appears in full in the Bill, pp. 25-52.

The Colorado River Compact, authorized by the Act of August 19, 1921, c. 72, 42 Stat. 171, signed at Santa Fe, New Mexico, November 24, 1922, and approved by the Boulder Canyon Project Act, *supra*. The Compact appears in full in the Bill, pp. 14-24.

An act of the California legislature entitled "An act to limit the use by California of waters of the Colorado River in compliance with the act of Congress known as the 'Boulder Canyon Project Act', approved December 21, 1928, in the event the Colorado River Compact is not approved by all of the States signatory thereto", approved by the Governor March 4, 1929; California Stats. 1929, p. 38, c. 16. This act appears in full in the Bill, pp. 54-56.

STATEMENT.

This case brings before the Court for the second time the Colorado River Compact and the Boulder Canyon Project Act. (*Arizona v. California,* 283 U. S. 423.)

The State of California and the defendants which are public agencies of that State oppose the motion of the State of Arizona upon two grounds: (1) the proposed testimony would not be admissible in evidence, and this Court should not compel the taking of such testimony; (2) the United States is an indispensable party, and the bill should not be received in the absence of consent of the United States to be sued.

The proposed bill seeks to perpetuate the testimony of certain men who participated in conferences at which was formulated the draft of the Colorado River Compact, signed at Santa Fe, New Mexico, November 24, 1922 (bill, p. 66). Arizona is not a party to the Colorado River Compact (bill, p. 24). No suit has yet been filed against anyone in which this evidence will be used (bill, p. 68). No cause of action has yet accrued to Arizona (bill, p. 68).

Arizona sets up five "issues" upon which it is alleged that the proposed testimony will be material in future actions (bill, pp. 67-68); that is, (1) in determining the true meaning and intent of the Colorado River Compact; (2) in determining the true meaning and intent of the Boulder Canyon Project Act; (3) in determining the true meaning and intent of the conditions which the Boulder Canyon Project Act requires to be attached to patents, grants, contracts, concessions, leases, permits, licenses, rights of way and other privileges from the United States;

(4) in determining the true purpose and meaning of the limitation of use in the State of California of waters of the Colorado River imposed by the Boulder Canyon Project Act and an act of the California legislature, which is recited in the bill (p. 53); and (5) determining the relative and respective rights of each of the parties to this action in the water of the Colorado and its tributaries and the use thereof and the burdens and restrictions imposed on such use.

Thus it is proposed to preserve testimony of oral conversations for the purpose of construing two statutes, a written interstate treaty, a group of written contracts, and certain undefined "relative rights" not yet subject to adjudication.

While the five "issues" are specifically mentioned in the bill and discussed separately herein it is to be noted that each and all of them rest solely upon the claim that Article III (b) of the Compact should be given some different meaning from that apparent on its face. The evidence sought to be perpetuated relates back to an alleged agreement respecting the meaning of that Article. The witnesses named in the bill are alleged to know of such an agreement (bill, p. 66). It is not alleged that evidence can be elicited from the proposed witnesses regarding the making or enacting of any other instrument set out or referred to in the bill. A determination, therefore, of the case in relation to said Article III (b) must prove controlling as to the other "issues".

The Compact, printed in full in the bill (pp. 14-24) is an agreement among the States of California, Nevada, Utah, Wyoming, Colorado, and New Mex-

ico. (bill, p. 24.) These States, with Arizona, comprise the Colorado River Basin (bill, pp. 5, 16).

As a matter of procedure, the States sent negotiators to various conferences. A draft of the Compact was prepared, but by its terms it was not binding until approved by the several State Legislatures, and by the Congress (bill, p. 23). The Compact was signed by the negotiators at Santa Fe, New Mexico, Nov. 24, 1922 (bill, p. 24). A negotiator representing Arizona signed the final draft of the Compact, but the legislature of that State did not ratify his act or approve the Compact (bill, p. 24). The other States named, through their respective State Legislatures, and the United States through the Congress, duly approved the Compact and (the requirement that all seven states act favorably having been waived) the agreement became binding upon them.

We mention these details at the outset for the purpose of specifically directing the attention of the Court to one of the controlling facts in the pending cause, *i. e.,* that the conversations herein sought to be perpetuated as testimony occurred, not between contracting parties in the ordinary sense, but between negotiators or delegates who acted without power to bind their respective States. The actions which ultimately bound the signatories to the Compact were the actions of the several legislative bodies which approved the document. The intent of these legislative bodies must be determined by the language before them. It cannot be judged by conversations between delegates in which legislatures did not participate.

Article III of the Compact (pp. 17-19) undertook an apportionment of part of the flow of the Colo-

rado River System, and is the subject of this proceeding. Article III(a), (bill, p. 17) apportioned from the Colorado River System to the "Upper Basin" and to the "Lower Basin", respectively, the exclusive beneficial consumptive use of 7,500,000 acre feet of water per annum, or a total of 15,000,000 acre feet. Article III(b), (bill, p. 18) provided that in addition to the apportionment in Paragraph (a), the "Lower Basin" was given the right to increase its beneficial consumptive use by 1,000,000 acre feet per annum. The Compact recognized that there were surplus waters, unapportioned by the Compact. (Art. III(f); bill, p. 19.) The terms "Colorado River System", "Lower Basin", and "Upper Basin", are all defined in Article II (bill, p. 16-17).

All of the proposed testimony is said to relate to the "meaning and intent" of Article III(b). It is not alleged that this paragraph is ambiguous, or the result of mistake or fraud, but that the negotiators, in agreeing upon Article III(b), also entered into another and collateral agreement not appearing on the face of the Compact. (Bill, p. 13.) Article III(b), is quoted in the bill as reading (bill, p. 13):

> "(b) In addition to the apportionment in paragraph (a), the *Lower Basin* is hereby given the right to increase its beneficial consumptive use of such waters by one million acre foot per annum." (Italics supplied; and see p. 18 of the bill.)

The alleged collateral agreement, not appearing in the Compact, is said by complainant to be as follows (bill, p. 14):

> "that the waters apportioned by Article III(b), of said Compact were for the sole and exclusive use and benefit of the *State of Arizona*, and it was further agreed that a supplemental Compact between the States of California, Nevada, and Arizona should be adopted and that such supplemental Compact should so provide." (Italics supplied.)

The "meaning and intent" ascribed by Arizona to Article III(b) of the Compact, and which the proposed testimony is said to prove, contradicts the definition of "Lower Basin" written by the negotiators of the Compact and now appearing in Article II(g) of the Compact (bill, p. 17):

> "(g). The term "Lower Basin" means those parts of the States of Arizona, California, Nevada, New Mexico, and Utah within and from which waters naturally drain into the Colorado River system below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River system which are now or shall hereafter be beneficially served by waters diverted from the system below Lee Ferry."

Thus the Compact defines the Lower Basin as including parts of five States, whereas Arizona seeks to show that the words "Lower Basin" appearing in Article III(b), mean Arizona solely and exclusively.

It is ~~admitted~~ not claimed that ~~Arizona never ratified~~ the agreement of the negotiators was reduced to writing or ratified by any defendant, or that its existence was reported to any legislature. In fact Arizona alleges (bill p. 68):

> "That the witnesses hereinbefore named *alone* know the facts herein stated * * *". (Italics supplied.)

It is admitted that Arizona never ratified the Colorado River Compact negotiations (bill, p. 24). It is admitted that no supplemental Compact between California, Nevada and Arizona has ever been negotiated or signed (bill, p. 24).

Nevertheless, it is alleged (bill, p. 66):

> "(l) That the true purpose and meaning of said subdivision (b) of Article III of said Compact can be determined and established by the testimony of certain persons present at the time the Compact was negotiated and signed, as parties thereto, their advisors, agents, and attorneys who were present at their negotiations and the signing of said Compact, and who alone know the facts relating to the true construction, meaning and intent of said subdivision (b) of Article III of said Colorado River Compact as hereinabove set forth."

This testimony, although known only to the witnesses named in the bill, will, it is said, also be material in showing the meaning and intent of the Boulder Canyon Project Act (bill, p. 67), enacted six years later. (Bill, p. 52.)

The Boulder Canyon Project Act, 45 Stat. 1057 (bill, pp. 25-52) effected four major objectives:

(I) Approved the Compact (sec. 13a; bill, p. 47) subject to certain conditions (sec. 4a; bill, p. 29), which were complied with (bill, p. 52), and authorized subordinate Compacts among the Lower Division States (sec. 4a; bill, p. 31) and among the States of the entire system (sec. 19; bill, p. 51). One of the conditions to approval of the Compact was the enactment of a law by California limiting its use of Colo-

rado River water to 4,400,000 acre feet of the waters apportioned by article III (a) of the Colorado River Compact, plus not more than one-half of any excess or surplus waters unapportioned (sec. 4a; bill, p. 30). This was done (bill, pp. 53-56).

(II) Authorized the construction of large works: a dam, power houses, etc., at Black Canyon or Boulder Canyon (sec 1; bill, p. 25); a canal connecting the Imperial and Coachella Valleys with the Colorado River (sec. 1; bill, p. 26); and the appropriation of $165,000,000 (sec. 3; bill, p. 29).

(III) Authorized contracts to be made by the Secretary of the Interior, under general regulations, for the generation and sale of energy, in order to make the project self-supporting (sec. 4(b); bill, p. 32; sec. 5; bill, pp. 33-35) and the delivery of stored waters (sec. 5; bill, p. 34).

The California defendants are entities named in the Secretary's water-delivery regulations (bill, pp. 56-63). The All-American Canal was to be separately financed (Act, sec. 1; bill, p. 26; sec. 4b; bill, p. 33).

(IV) Subjected all the authorizations contained in the Act to the Colorado River Compact, including the construction of the dam and canal (sec. 1; bill, pp. 25, 26); the proposed Lower Basin agreement (sec. 4b; bill, p. 31); the use of the dam and reservoir (sec. 6; bill, p. 39); again, the construction, management, and operation of all works (sec. 8(a); bill, p. 42); the rights of the United States and those claiming under it to Colorado River waters (sec. 13(b); bill, p. 48); all patents, grants, contracts, concessions, leases, permits, licenses, rights of way, or other privileges (sec. 13(c); bill, p. 48); and all new compacts (sec. 19; bill, p. 51).

The Act also contained other authorizations, but these are not related to any allegation in the bill.

By virtue of provisions in the Boulder Canyon Project Act, the United States, in the control and operation of its property, would be affected by the restatement of the Compact proposed by Arizona (bill, p. 42):

> "Sec. 8(a) The United States, its permittees, licensees, and contractees, and all users and appropriators of water stored, diverted, carried, and-or distributed by the reservoir, canals, and other works herein authorized, shall observe and be subject to and controlled by said Colorado River Compact in the construction, management and operation of said reservoir, canals and other works, and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes, anything in this act to the contrary notwithstanding, and all permits, licenses, and contracts shall so provide."

Again (bill, p. 48):

> (Sec. 13) "(b) The rights of the United States in and to waters of the Colorado River and its tributaries howsoever claimed or acquired, as well as the rights of those claiming under the United States, shall be subject to and controlled by said Colorado River Compact."

See also sections 1 (bill, p. 25) and 6 (bill, p. 39).

The United States is not a party to this action.

The Act of the legislature of California, referred to in the bill (p. 53), accepted the limitation upon use of Colorado River water in California proposed by section 4a of the Boulder Canyon Project Act (bill, p. 30).

While the point is subject to serious question, it is assumed in the argument which follows that Arizona has an interest in the proper construction of the Colorado River Compact, although not a party to it, because of the incorporation of the Compact in the Boulder Canyon Project Act and in California's legislative agreement with the United States limiting use of water in that State. The question argued herein is whether the Compact may be construed in the manner attempted here, and in the absence of the United States as a party.

SUMMARY OF ARGUMENT.

I.

The question of jurisdiction of the Court may be open to doubt.

II.

The proposed testimony would not be admissible in evidence upon any issue stated in the bill. The Court should not compel the taking of such testimony, and the defendants should not be burdened by the taking of it.

1. The proposed testimony, being parol, is not admissible to construe, vary or contradict the Colorado River Compact. First, the Compact is a treaty between States and a statute binding upon the States and their citizens. Second, the Compact is a written agreement. Third, the alleged parol agreement between the negotiators of the Compact could not be effective to modify the Compact between the States, since the parol agreement was not ratified by the States nor shown to have been incorporated in the legislative history of any of the Acts by which the Compact was ratified by the six legislatures or consented to by Congress.

2. The proposed testimony would not be admissible in interpretation of the Boulder Canyon Project Act. The rules of statutory construction would prevail. It is not claimed that the alleged agreement was made a part of the legislative history of that act, or that Congress consented to or ratified it, or knew of its existence.

3. The proposed testimony would not be admissible in interpretation of the conditions imposed by the United States on the use of the public lands, and, if it were, this Court has held that Arizona has no interest in such conditions.

4. The proposed testimony would be inadmissible in interpretation of the legislative agreement between the United States and California limiting the use of water in California. It is not alleged that the supposed Santa Fe conversations made a part of the legislative history of the California statute, or that Congress intended to require that the statute of California refer to a compact differing from the plain language of the Compact as written.

5. The proposed testimony would be inadmissible in any action to establish the relative rights of Arizona and the defendants in the waters of Colorado River system. Nor would proof of the alleged acts of the defendants' negotiators charge the defendants with any duty or confer any right upon them outside the Compact. The alleged plan to enter into a Nevada-California-Arizona Compact cannot be specifically enforced.

6. Since the proposed testimony could not be received under established rules of evidence it should not be taken.

III.

The United States in an indispensable party to this cause, and cannot be sued without its consent. The United States is governed by the Colorado River Compact in carrying out the Boulder Canyon Proj-

ect Act, including the use of its storage works and delivery of water therefrom, and should be heard on the question of whether testimony is to be taken with a view to interpreting or modifying the Compact. Even if the proposed testimony were admissible in a later cause involving these defendants it could not affect the United States, and it would be inequitable to the defendants to compel the taking of testimony which might be asserted to control their use of Colorado River water, but not the government's disposition of it.

ARGUMENT.

I.

The Jurisdiction.

The jurisdiction of this Court to entertain this proceeding lies at the threshold. Arizona admits in her statement on jurisdiction (p. 71) that the Congress has never, by statute, recognized that this Court had the power to perpetuate testimony. Apparently no such statute exists. (We do not argue, of course, that such statute is required.) No rule of this Court expressly refers to such proceedings. This Court has never, so far as the books show, in the one hundred and fifty years of its existence, declared or exercised such jurisdiction.

Inasmuch as the case is one of first impression and Arizona has failed to furnish the Court with any substantial authority to support jurisdiction, we have given the subject consideration. While we are not prepared to assert that the Court has not jurisdiction, there is sufficient doubt to warrant us in laying before the Court, for such consideration as it may merit, the reasons why jurisdiction may be questioned.

Jurisdiction has been defined by this Court as "the power to hear and determine the subject matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them; * * *" (*Rhode Island v. Massachusetts*, 12 Peters 657, 718.)

This Court has original jurisdiction in "controversies between two or more States". (Constitution, Article III, Section 2, Clauses 1 and 2.)

If there is no "controversy", then there is no jurisdiction in this Court.

For the Court to entertain this Bill, it must exercise jurisdiction. The granting of a commission to take testimony is as much an exercise of jurisdiction as would be the pronouncing of a judgment.

The Constitution makes a "controversy" indispensable to the jurisdiction of this Court over an action between States. Does a mere claim that a controversy will arise at some indefinite time in the future satisfy this requirement?

It may be contended by Arizona that this proceeding is within the general equity powers of this Court, because it was within the powers formerly exercised by English Courts of Chancery. But this does not necessarily follow. This Court's equity powers in actions between States are limited and qualified by the Constitution, in that there *must be* a controversy. Nor does it necessarily follow that, because this Court may have jurisdiction of the future substantive controversy, it has jurisdiction of this proceeding, as an incident thereto. Because the Constitution itself demands that there be a controversy, it might seem that jurisdiction cannot now affirmatively be found to exist, when no controversy now exists, and there is an uncertainty whether the alleged future controversy will ever come into being.

If the Court determines that it has jurisdiction, the next question is whether it should exercise its jurisdiction. This is a power highly discretionary in its nature.

The jurisdiction of this Court in actions between States, as said in *Louisiana v. Texas,* 176 U. S. 1, 15,

> "is of so delicate and grave a character that it was not contemplated that it would be exercised save when the *necessity* was *absolute* and the matter in itself properly justiciable." (Italics supplied)

As said in *North Dakota v. Minnesota,* 263 U. S. 365, 374:

> "In such action by one State against another, the burden on the complainant State of sustaining the allegations of its complaint is much greater than that imposed upon a complainant in an ordinary suit between private parties. 'Before this Court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence.' New York v. New Jersey, 256 U. S. 296, 309; Missouri v. Illinois, 200 U. S. 496, 521."

See also *Kansas v. Colorado,* 185 U. S. 125 and 206 U. S. 46; *Connecticut v. Massachusetts,* 282 U. S. 660, 669; *Alabama v. Arizona,* 54 Sup. Ct. Rep. 399 (decided Feb. 5, 1934).

II.

THE PROPOSED TESTIMONY WOULD NOT BE ADMISSIBLE IN EVIDENCE, AND THE COURT SHOULD NOT COMPEL THE TAKING OF TESTIMONY WHICH IT CANNOT RECEIVE UNDER ESTABLISHED RULES OF EVIDENCE.

THE COLORADO RIVER COMPACT.

1. The proposed testimony would not be admissible to show the meaning and intent of the Colorado River Compact.

First, As between the states that have approved the Colorado River Compact, that Compact constitutes a treaty. Within each of the states it constitutes an irrevocable statute binding alike upon the state and its citizens. In construing the provisions of that Compact, the rules of construction applicable to treaties and statutes prevail. Under these rules, discussed later with reference to the Boulder Canyon Project Act, parol evidence is not admissible.

The states have surrendered, by the Constitution, their inherent rights to make treaties (Art. 1, sec. 10, Cl. 1). They are permitted, however, with the consent of Congress, to enter into compacts or agreements (Art. 1, Sec. 10, Cl. 3). Such instruments by whatever name, when lawfully made, are instruments of sovereignty. *Poole, et al., v. The Lessee of Fleeger, et al.,* 11 Peters 185-209; *Rhode Island v. Massachusetts,* 12 Peters 657-725; *Virginia v. Tennessee,* 148 U. S. 503; *Couch v. Tennessee,* (Supreme Court, Tennessee), 203 S. W. 831; *Sims v. Irvine,*

3 Dallas, 425; *Marlatt v. John Silk, et al.,* 11 Peters, page 1.

In this case consent and approval of Congress was given and the instrument became a treaty between six states and the United States. It is political in character and cannot be altered judicially. It cannot be changed or modified without approval of the legislative bodies of all of the high contracting parties. It is an instrument of greatest dignity, "deposited in the archives of the Department of State of the United States of America" (Art. XI; bill, pp. 23-24).

Second, quite aside from the inadmissibility of this type of testimony in interpretation of a statute, it is clear that it would be inadmissible in construction of the compact, considered solely as a contract. *DeWitt v. Berry,* 134 U. S. 306. Cf. *Burnes v. Scott,* 117 U. S. 582. *Northern Assurance Co. v. Grand View Building Asso.,* 183 U. S. 308, 318. It does not explain the Compact; it contradicts the instrument and the statutes which ratified it. No ground for an exception to the parol evidence rule is alleged.

No ambiguity on the face of article III(b) is alleged; to the contrary, the bill admits (p. 10)

> "The term Lower Basin was used to designate those parts of the States of Arizona, California, Nevada, New Mexico, and Utah within and from which waters naturally drain into the Colorado River system below Lee Ferry and also all parts of states located without the drainage area of the Colorado River system which then or thereafter should be beneficially served by waters from the system below Lee Ferry."

This is not a case where the contemporary construction given by the negotiators is sought, or could be sought, in order to resolve an ambiguity in the language they used. It is admitted that they used the words "Lower Basin" deliberately, and intentionally defined them in article II(g).

But it is said that they agreed that, at some future time, by agreement among the states of the Lower Division, there should be earmarked for Arizona the allocation made by article III(b) to the Lower Basin. Thus the bill, while claiming that it was agreed "that said one million acre feet was to be used exclusively by and for the State of Arizona" (p. 13), and alleging certain reasons why such a result was fair, states (p. 13):

> " * * * it was agreed that in view of the fact that no appropriation or allocation of water had otherwise been made by said compact directly to any State, the one-million acre feet for the State of Arizona should be included in said compact by an allocation for the Lower Basin. * * *"

It is not alleged that Arizona has relied on the inducement of the alleged parol agreement in performing any act to her prejudice. It is alleged (bill, p. 14) that her representatives stated that they "would accept said compact" if the alleged agreement were made, "otherwise they would refuse to accept said compact", and while Arizona's negotiator signed the final draft, on p. 24 it is stated that Arizona did not ratify the Compact. Thus Arizona is not bound by the Compact or anything arising out of the negotiation therefor. It is not explained why the other parties to the alleged oral bargain can

be charged by it if she is not. If such a bargain was made, Arizona was not induced by it to ratify the Compact nor does she allege any other action taken on the faith of the supposed understanding.

Citation scarcely is necessary to demonstrate that parol testimony, under these circumstances, is not admissible to vary the Colorado River Compact, even considered as a contract and aside from its statutory effect.

An interstate compact in addition to its status as a treaty and a statute, is a contract: *Green v. Biddle,* 8 Wheat 1; *Poole v. Fleeger,* 11 Pet. 185; *Virginia v. Tennessee,* 148 U. S. 503; *Wharton v. Wise,* 153 U. S. 155.

Reformation of Articles II(g) and III(b) is not prayed, nor could such reformation be sought by Arizona. She is still a stranger to and unaffected by the Compact. (*Arizona v. California,* 283 U. S. 423) The Compact is not subject to reformation by judicial process (*Virginia v. Tennessee,* 148 U. S. 503). To make such a reformation would constitute the exercise of political power.

Third, The alleged understanding among the negotiators, if relied upon as a separate agreement, was not ratified by their respective legislatures.

The defendants' representatives were negotiators, not plenipotentiaries. The Act of Congress authorizing the negotiation of the Compact (42 Stat. 171; bill, p. 8) specifically stipulated:

> "Provided, that any such compact or agreement shall not be binding or obligatory upon any of the parties thereto unless and until the same shall have been approved by the legislature of

each of said States and by the Congress of the United States."

The State statutes authorizing the negotiation of the Compact also stipulated that ratification should be required: Cf. Arizona, Sess. L, 1921, ch. 46, p. 53; California, Stat. 1921, ch. 88, pp. 85, 86; Colorado, Laws 1921, ch. 246, pp. 811-815; Nevada, Laws 1920-21, ch. 115, pp. 190-191; New Mexico, Laws 1921, ch. 121, pp. 217-220; Utah, Laws 1919-1921 ch. 68, p. 184, Wyoming, Laws 1921 ch. 120, pp. 166-167.

The Compact itself provided (Art. XI, p. 23 of Bill):

> "This compact shall become binding and obligatory when it shall have been approved by the legislature of each of the signatory States and by the Congress of the United States."

In fact, Arizona alleges (bill, p. 24):

> "That by the terms of said compact it was to be binding when it had been ratified and approved by the legislatures of the several States and by the Congress of the United States".

The Colorado River Compact is an agreement among States, not among their negotiators: among their legislatures, and not among the "framers and signers" of the instrument. Arizona admits that her negotiator, Mr. Norviel, formally signed the Compact itself, but denies, rightly, that she is bound thereby. Nevertheless, without accepting any burden under the Compact she contends that she is entitled to the benefit of alleged preliminary agreements by negotiators of others, whose authority was no greater

than that of Mr. Norviel. Testimony of what any negotiator did and said will not be admissible to charge the defendants with any obligation not expressed on the face of the Compact as ratified. Neither can Arizona base any future cause of action upon such alleged oral agreement to make a supplementary Compact, because: (1) the proposed Compact never was made (p. 24), and (2) to enforce the making of such a Compact would require of this court the exercise of political as distinguished from judicial power. This, the court has consistently refused to do. (*Georgia v. Stanton,* 6 Wall. 50; *Massachusetts v. Mellon,* 262 U. S. 447, 483; *New Jersey v. Sargent,* 269 U. S. 328, 332).

THE BOULDER CANYON PROJECT ACT.

2. The proposed testimony would not be admissible in construction of the Boulder Canyon Project Act.

The interpretation of the Boulder Canyon Project Act is a matter of statutory construction. It is not alleged that Congress approved the alleged collateral bargain, or intended to adopt it, or knew of its existence. Arizona alleges that the witnesses named in the bill alone know of the alleged agreement (Bill p. 68). Obviously if this be true the Congress cannot be said to have known of it or acted with reference thereto. It is alleged that Congress authorized in the Project Act an agreement among Arizona, California, and Nevada (sec. 4a; bill, p. 31), but this was admittedly an authorization for a new agreement, not a recital of an old one. No ambiguity in the statute is alleged. As said in *Caminetti v. U. S.,* 242 U. S. 470, 485:

> "Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion".

Compare *Wisconsin R. R. Comm. v. C. B. & Q. R. R.*, 257 U. S. 563, 589; *Penna. R. R. Co. v. International Coal Mining Co.*, 230 U. S. 184; *Mackenzie v. Hare*, 239 U. S. 299, 308; *Adams Express Co. v. Kentucky*, 238 U. S. 190, 199.

But even if Congress intended to subject the United States to a compact differing from the face of the agreement before it, that intent can be shown, if at all, only by reference to the legislative history of the Act. The intent of Congress in 1928 cannot be shown by proof of what was said in Santa Fe or other cities in 1922. It is not alleged that the agreement was brought before Congress in any manner competent to be shown in aid of construing a statute, either in the form of a committee report: *Duplex Co. v. Deering*, 254 U. S. 443; *Binns v. U. S.*, 194 U. S. 486, 495; *Holy Trinity Church v. U. S.*, 143 U. S. 457, 464; *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 20; *U. S. v. Coca Cola Co.*, 241 U. S. 265, 282; *Wisconsin R. R. Comm. v. C. B. & Q. R. Co.*, 257 U. S. 563, 589; *Caminetti v. U. S.*, 242 U. S. 470, 490; *Lapina v. Williams*, 232 U. S. 78, 90; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 42; *Cramp & Sons v. Curtis Turbine Co.*, 246 U. S. 28, 37; *Lewis Publishing Co. v. Morgan*, 229 U. S. 288, 312; or in a supplemental report on the floor by a committee member in charge of the bill: *Duplex Co. v. Deering*, 254 U. S. 443, 475; *Binns v. U. S.*, 194 U. S. 486, 496; *Penna. R. R. Co. v. International Coal Co.*, 230 U. S.

184, 198, 199; *U. S. v. Coca Cola Co.*, 241 U. S. 265, 281; *U. S. v. St. P. M. & M. Ry. Co.*, 247 U. S. 310, 318; *Wisconsin R. R. Comm. v. C. B. & Q. R. Co.*, 257 U. S. 563, 589; or in a statement on the floor by a member of a conference committee appointed following disagreement of the two houses; *U. S. v. Trans-Missouri Freight Assn.*, 166 U. S. 290, 317; *Blake v. National Banks*, 23 Wall. 307, 317; or in amendments considered during debate on the bill: *Blake v. National Banks*, 23 Wall., 307, 317; *Johnson v. Southern. Pacific Co.*, 196 U. S. 1, 20; *Penna. R. R. Co. v. International Coal Co.*, 230 U. S. 184, 198; *The Five Per Cent Discount Cases*, 243 U. S. 97, 107; *U. S. v. Coca Cola Co.*, 241 U. S. 265, 281; *U. S. v. Burr*, 159 U. S. 78, 85; *Lewis Publishing Co. v. Morgan*, 229 U. S. 288, 309, 312; *U. S. v. Alexander*, 79 U. S. 177; *Dunlap v. U. S.*, 173 U. S. 65, 75; or in a message of the President: *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 19; or in a communication from the head of a department: *Dunlap v. U. S.*, 173 U. S. 65, 75; *U. S. v. Union Pacific R. R. Co.*, 91 U. S. 72, 90; nor is it claimed that the alleged agreement was brought before Congress by any other of the methods by which extraneous matters may be shown in interpretation of a statute or at all. And not even the report of the Committee itself may be resorted to for the purpose of construing a statute contrary to its plain terms. *Penna. R. R. Co. v. International Coal Co.*, 230 U. S. 184, 199, citing cases; *R. R. Comm. v. Chicago, B. & Q. Ry. Co.*, 257 U. S. 563, 589.

CONDITIONS ON USE OF PUBLIC LANDS.

3. The proposed testimony would not be admissible in interpretation of the conditions imposed on the use of public lands by the Boulder Canyon Project Act. Aside from the question of statutory construction, the Court has already stated, in *Arizona v. California,* 283 U. S. 423, 464:

> "Arizona has, of course, no constitutional right to use, in aid of appropriation, any land of the United States, and it cannot complain of the provision conditioning the use of such public land. Compare *Utah Power & Light Co. v. United States,* 243 U. S. 389, 403-5."

If Arizona may not complain of the conditioning of the use, it may not complain of the form of the condition.

THE AGREEMENT BETWEEN THE UNITED STATES AND CALIFORNIA.

4. The proposed testimony would be inadmissible in interpretation of the legislative agreement between the United States and California limiting California's use of water.

The agreement between the United States and California is solely one between their legislatures; it was never negotiated and signed, like a contract, but appears only in reciprocal legislation of the two sovereigns.

What has been said about admissibility of evidence in construction of the Boulder Canyon Project Act applies to the statute of California (bill, p. 53). It is not alleged that Congress had knowledge of the al-

leged collateral agreement regarding article III(b) when it passed the Boulder Canyon Project Act, or that it intended to require that the statute of California (sec. 4a; bill, p. 30) refer to a compact differing from the face of the Compact to which the proposal of Congress referred, or that the California legislature intended to accept a proposal other than that so put before it.

Proof of what negotiators said in Santa Fe or other places in 1922 is not part of the legislative history of a bill enacted in Washington in 1928 or of another bill enacted in Sacramento in 1929. Again we may mention Arizona's allegation (bill, p. 68) that the negotiators alone knew of the agreement.

"RELATIVE RIGHTS"

5. The proposed testimony would not be admissible in any action to establish the relative rights of Arizona and the defendants in the waters of the Colorado River System.

As among the six parties to the Compact and the United States, their relative rights and duties are fixed by the Compact; they are content with it as it stands, and seek no judicial construction of it. As between Arizona and any of the parties to the Compact, the instrument is not controlling.

Admittedly "it may be years before any waters are taken from said river under said contracts, or the rights of Arizona therein are interfered with" (bill, p. 68), and it is not apparent that what was said in 1922 will aid this Court in determining the issue as then presented. If and when an action shall be brought, say in 1939 or 1959, it

will be determined by the facts and law as then found to exist. Cf. *Kansas v. Colorado,* 206 U. S. 46, 98; *Missouri v. Illinois,* 200 U. S. 496; *Wyoming v. Colorado,* 259 U. S. 419; *New York v. Illinois,* 274 U. S. 488; *Wisconsin v. Illinois,* 278 U. S. 367; 281 U. S. 179; *Connecticut v. Massachusetts,* 282 U. S. 660, 671; *Arizona v. California,* 283 U. S. 423. What certain negotiators may have said in 1922 cannot give rise to any equities in favor of Arizona or against any other state. Arizona does not allege that the events of 1922 initiated an appropriation as against any other State, or that she can acquire any right against these defendants other than by priority of appropriation. Cf. *Wyoming v. Colorado,* 259 U. S. 419, 470, 471, and cases cited.

If this or any Court had the power to, and should in some future action, modify the plain terms of the Compact in accordance with Arizona's contentions, the Compact would still be an agreement only among the parties to it, in which Arizona would have no more interest than she has in the Compact as written. She can appropriate water in the face of the instrument as it now stands, as well as she could under a judicially modified compact.

This Court in no event will make declaratory decrees. *Arizona v. California,* 283 U. S. 423, 464; *Alabama v. Arizona,* 54 Sup. Ct. R. 399. Testimony which looks only to a declaratory ~~can lead only to an ineffective~~ decree should not be taken. It is not alleged that, if the facts claimed by Arizona were proved by the proposed testimony, they would establish a cause of action against any defendant, or a defense against a future action by any present defendant.

The allegation that the negotiators agreed that a Nevada-California-Arizona Compact, to be made later, should provide that all III(b) water should go to Arizona, is patently insufficient. The evidence of the supposed agreement, if fully supporting this allegation, would not entitle Arizona to specific relief in this or any Court compelling the other States to make and ratify such a Compact. That, as we have seen, would call for the exercise of political power.

EVIDENCE WHICH CANNOT BE RECEIVED SHOULD NOT BE ORDERED TAKEN.

6. Since the proposed testimony cannot be received under established rules of evidence it should not be taken. If taken, there is no assurance that it will not be offered in some future action in an inferior tribunal, which will regard this Court's order herein as foreclosing the question of admissibility. The question of the admissibility of the evidence sought to be perpetuated is squarely before the court. The issues to which the evidence is addressed are stated in the bill. (pp. 67-68) If the proposed testimony is not material and competent with reference to these issues, this proceeding must fail. The ruling of the court herein will be regarded as conclusive as to the materiality and competency of evidence offered in connection with the issues set up in the bill, at least so far as inferior courts are concerned. It is to be noted that the evidence sought to be perpetuated is intended to be available *"in any and all future litigation"*, (bill, p. 70), involving construction of the various documents involved herein, between these parties or some of them.

The defendants would be burdened without purpose. The mere order of the court herein directing the recording of testimony would cast an utterly unwarranted doubt upon the meaning of the compact; a doubt which, as appears by the bill, could not be settled for many years. Any judicial recognition of the existence of such a cloud would have far reaching effects.

For the last decade and at the present time works of great magnitude have been and are going forward, government funds and the funds of numerous public corporations have been expended, communities are in process of development, all based upon the stability of the Santa Fe Compact as written. (See Reports of the Secretary of the Interior for 1930, pp. 22, 24, 76, 77; 1931, pp. 22, 24, 99, 100; 1932, pp. 11, 15, 95, 96; 1933, pp. 6, 35, 36.) It is no answer to the objections hereby presented that the mere recordation of inadmissible testimony can do no harm. If the impression is created that unambiguous terms of the Compact can be modified by, or construed with reference to, oral agreements made during negotiations and known only to a limited number of witnesses, a cloud will be cast over these projects until the testimony is ultimately weighed by the court; and "it may be years" (bill, p. 68) before that "judicial determination" is made.

III.

THE UNITED STATES IS AN INDISPENSABLE PARTY, AND THE BILL SHOULD NOT BE RECEIVED IN THE ABSENCE OF CONSENT BY THE UNITED STATES TO BE SUED.

The United States would be doubly affected by the proposed testimony. First, the Boulder Canyon Project Act specifically subjects the United States to the control of the Compact (sec. 8a, bill, p. 42) sec. 13b; bill, p. 48) in building and operating works title to which will rest in the government (sec. 6, bill p. 39) for the construction of which the expenditure of $165,000,000 was authorized (sec. 3; bill, p. 29) and in the disposition of stored waters (sec. 5; bill, p. 33), including contracts for the delivery of water which are now in force (bill, p. 63). Second, the United States and California are parties to a legislative agreement covering the use of water in California (bill, p. 53). Revenues to the United States from disposition of this water are part of the revenues required by statute for amortization of the cost of Boulder Dam (sec. 4b; bill, p. 4b) and the water delivery contracts must be for "permanent service" (sec. 5; bill, p. 34) Further, the use of public land for access to the Colorado River is likewise subject to the Compact (sec. 13c; bill, p. 48). It is plain that the United States, as owner of a dam and other property whose use is controlled by the Compact, must be heard in any proceeding affecting the "purpose and meaning" of the Compact. *Belknap v. Schild,* 161 U. S. 10; *Goldberg v. Daniels,* 231 U. S. 218; *International Postal Supply Co. v. Bruce,* 194 U. S. 601, 605; *Morrison v. Work,* 266 U. S. 481.

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Likewise the United States, as party to a separate bilateral agreement with California, must be heard in any proceeding purporting to affect California, the other party, by testimony affecting the meaning of the agreement. The United States and not the nominal defendant, the Secretary of the Interior, is the real party in interest. Cf. *Minnesota v. Hitchcock,* 185 U. S. 373, 387; *Oregon v. Hitchcock,* 202 U. S. 60, 68, 69; *Louisiana v. Garfield,* 211 U. S. 70, 78; *Naganab v. Hitchcock,* 202 U. S. 473; *New Mexico v. Lane,* 243 U. S. 52.

If a bill is subject to dismissal because of absence of the United States, the bill should not be received in the first instance. *Louisiana v. McAdoo,* 234 U. S. 627.

The United States has not consented to be sued, and cannot be sued without its consent even by a State. *Kansas v. United States,* 204 U. S. 331, 342.

The defendants would be adversely affected if the cause were allowed to proceed without the United States. It would be inequitable to compel the taking of testimony which, if admissible at all, would be urged to control their use of water of the Colorado River system but which could not affect the United States in its disposition of such water, as, for instance, by treaty with Mexico. It will be borne in mind that the Compact does not allocate the whole flow of the river, but leaves an unapportioned surplus, and that the United States is free to dispose of surplus waters by international agreement. (Compact, art III(c); bill, p. 18; Boulder Canyon Project Act, sec. 20; bill, p. 52.) The whole purpose of the bill is to lay a foundation for showing that a part of

the water now contracted for by California defendants is such surplus water. The defendants, therefore, have a direct interest in the question of whether the United States is present in these proceedings.

CONCLUSION.

It is respectfully submitted that the motion for leave to file the bill should be denied.

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for Palo Verde Irrigation District.
CHAS. L. CHILDERS,
for Imperial Irrigation District.
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C. L. BYERS, *City Attorney.*
PHIL D. SWING,
for the City of San Diego.
THOMAS WHELAN,
PHIL D. SWING,
for the County of San Diego.

FILE COPY

IN THE

Supreme Court of the United States

October Term, 1933

No. ..... (Original)

STATE OF ARIZONA, *Complainant,*

vs.

STATE OF CALIFORNIA, STATE OF COLORADO, STATE OF NEVADA, STATE OF NEW MEXICO, STATE OF UTAH, STATE OF WYOMING, HAROLD L. ICKES, Secretary of the Interior of the United States, PALO VERDE IRRIGATION DISTRICT, a public corporation of the State of California, IMPERIAL IRRIGATION DISTRICT, a public corporation of the State of California, COACHELLA VALLEY COUNTY WATER DISTRICT, a public corporation of the State of California, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, a public corporation of the State of California, CITY OF LOS ANGELES, a municipal corporation of the State of California, CITY OF SAN DIEGO, a municipal corporation of the State of California, and COUNTY OF SAN DIEGO, a public corporation of the State of California, *Defendants.*

Joint and Several Return of Defendant States, Colorado, Nevada, New Mexico, Utah and Wyoming, to Rule to Show Cause Why Leave Should Not Be Granted the State of Arizona to File Bill to Perpetuate Testimony.

PAUL P. PROSSER,
Attorney General of Colorado,
GRAY MASHBURN,
Attorney General of Nevada,
E. K. NEUMANN,
Attorney General of New Mexico,
JOSEPH CHEZ,
Attorney General of Utah,
RAY E. LEE,
Attorney General of Wyoming,
Solicitors for respective Defendants.

COLO. QUICK PRINTING Company, Lawyers' Co-op. Bldg., Denver, Colo.

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Joint and Several Return of Defendant States, Colorado, Nevada, New Mexico, Utah and Wyoming, to Rule to Show Cause Why Leave Should Not Be Granted the State of Arizona to File Bill to Perpetuate Testimony.

Come now the defendant States, COLORADO, NEVADA, NEW MEXICO, UTAH and WYOMING, by their respective Attorneys General, and, for their joint and several Return to the Rule to Show Cause, issued herein under date of February 20, 1934, why leave to file a Bill to Perpetuate Testimony by complainant, State of ARIZONA, against said defendant States, among other defendants, should not be granted, aver:

Said defendant States, COLORADO, NEVADA, NEW MEXICO, UTAH and WYOMING, and each of them, have no objection to interpose, either severally or jointly, to the filing of the aforesaid Bill by complainant, State of ARIZONA, and to the taking of any competent, relevant and material testimony on the part of the witnesses therein named, or on the part of any of them, in order that the same may be perpetuated.

And in this behalf said defendant States, COLORADO, NEVADA, NEW MEXICO, UTAH and WYOMING, pray that, if the Court should determine that, under its Rules and in equity and good conscience the complainant, State of ARIZONA, is entitled to file the aforesaid Bill and to take competent, relevant and material testimony on the part of the witnesses therein named, or on the part of any of them, for the purpose of having the same perpetuated, the order therefor may save and protect the rights of these defendant States, COLORADO, NEVADA, NEW MEXICO, UTAH and WYOMING, in the following respects:

(1) That each of these defendant States may be specifically granted the right to cross-examine each and every witness whose testimony may be taken by the complainant, State of ARIZONA.

(2) That there may be specifically reserved to each of these defendant States the right to object to any of such testimony, either at the time of the taking thereof or at any time thereafter when the same might be presented to this Court, for such reasons and upon such grounds as may be specified by such defendant State;

(3) That the lawful costs incurred by these defendant States incident to the taking of such testimony be so apportioned and taxed as this Court may consider proper; and

(4) That the rights of these defendant States, COLORADO, NEVADA, NEW MEXICO, UTAH and WYOMING, may be otherwise safeguarded in the premises, in such manner and to such extent as this Court may deem to be consonant with equity and justice.

Respectfully submitted,

PAUL P. PROSSER,
Attorney General of Colorado,

GRAY MASHBURN,
Attorney General of Nevada,

E. K. NEUMANN,
Attorney General of New Mexico,

JOSEPH CHEZ,
Attorney General of Utah,

RAY E. LEE,
Attorney General of Wyoming,

Solicitors for respective Defendants.

PROOF OF MAILING COPY OF RETURN.

STATE OF COLORADO, }
CITY AND COUNTY OF DENVER } ss.

PIERPONT FULLER, JR., being first duly sworn, on his oath deposes and says that on the 22nd day of March, A. D. 1934, he deposited in the United States Post Office in the City and County of Denver, Colorado, in a sealed envelope with postage prepaid by registered mail, a true printed copy of the foregoing Return to the Rule to Show Cause, addressed to Arthur T. LaPrade, Attorney General of Arizona, Attorney General's Office, Phoenix, Arizona.

PIERPONT FULLER, JR.

Subscribed and sworn to before me this 22nd day of March, A. D. 1934.

My commission expires August 7, 1934.

ELIZABETH D. PATTEN,
Notary Public.

(SEAL)

FILE COPY

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In the Supreme Court of the United States

OCTOBER TERM, 1933

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, STATE OF COLORADO, STATE OF NEVADA, STATE OF NEW MEXICO, STATE OF UTAH, STATE OF WYOMING, HAROLD L. ICKES, SECRETARY OF THE INTERIOR OF THE UNITED STATES, PALO VERDE IRRIGATION DISTRICT, A PUBLIC CORPORATION OF THE STATE OF CALIFORNIA, IMPERIAL IRRIGATION DISTRICT, A PUBLIC CORPORATION OF THE STATE OF CALIFORNIA, COACHELLA VALLEY COUNTY WATER DISTRICT, A PUBLIC CORPORATION OF THE STATE OF CALIFORNIA, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, A PUBLIC CORPORATION OF THE STATE OF CALIFORNIA, CITY OF LOS ANGELES, A MUNICIPAL CORPORATION OF THE STATE OF CALIFORNIA, CITY OF SAN DIEGO, A MUNICIPAL CORPORATION OF THE STATE OF CALIFORNIA, AND COUNTY OF SAN DIEGO, A PUBLIC CORPORATION OF THE STATE OF CALIFORNIA, DEFENDANTS

RESPONSE OF DEFENDANT HAROLD L. ICKES TO THE RULE TO SHOW CAUSE, AND BRIEF IN SUPPORT THEREOF

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RESPONSE OF THE DEFENDANT HAROLD L. ICKES TO THE RULE TO SHOW CAUSE

Now comes Harold L. Ickes, Secretary of the Interior, one of the defendants in this cause, and

for his response to the rule to show cause issued by this Court on February 20, 1934, says that the motion for leave to file the bill to perpetuate testimony should not be granted, for the following reasons:

1. The matters set out in the proposed bill show that the contemplated future suit, in aid of which the leave is asked to file this Bill, will relate not only to the property and rights of the United States, but to the carrying out by it of governmental functions. The suit is, therefore, in effect, one against the United States and to which it is a necessary party. The United States has not consented to be sued on such a cause of action.

2. The testimony sought to be perpetuated relates to certain conferences held, and understandings said to have been reached, in Santa Fe, New Mexico, in 1922. (Bill, pp. 11–14.) It is asserted that the same will be material upon the construction of three documents (Bill, pp. 66–69), to wit:

(a) The Colorado River Compact, signed at Santa Fe, November 24, 1922, especially Article III (b) thereof;

(b) The Boulder Canyon Project Act, approved December 21, 1928, c. 42, 45 Stat. 1057–1066, especially subdivision (2) of Section 4 (a) thereof; and

(c) The Act of the legislature of the State of California, approved March 4, 1929 (Cal. Stats. of 1929, c. 16).

Said testimony, we submit, can never become admissible or competent upon the interpretation of any of said documents, because:

(a) As to the Colorado River Compact, the provisions of said Article III (b), read in connection with Article II (g), are clear and unambiguous, and not subject to amendment or interpretation by prior oral understandings.

(b) As to the Boulder Canyon Project Act the same is an act of Congress approved in 1928, and not subject to interpretation or amendment by oral understandings had, by gentlemen not members of the Congress, in 1922.

(c) As to the Act of California, the same was passed in 1929, is in the language of the Boulder Canyon Project Act, is directed to be construed in accordance with the latter (Sec. 2) and is not subject to interpretation or amendment by oral understandings had, by gentlemen not members of the legislature of California, in 1922.

3. Substantial claims of Arizona can arise in future only if "the stored water is used in such a way as to interfere with the enjoyment by Arizona, or those claiming under it, of any rights already perfected or with the right of Arizona to make additional legal appropriations and to enjoy the same." (283 U.S. 423, 464.) If and when such claims arise, the rights of all the parties will depend on then existing conditions, and not on the under-

standing said to have been reached in 1922 but which was never signed or ratified. (Bill, p. 24.)

Wherefore this defendant prays that the motion for leave to file the proposed bill be denied, and the rule discharged.

HAROLD L. ICKES,
Secretary of the Interior.
By J. CRAWFORD BIGGS,
Solicitor General.

APRIL 1934.

BRIEF ON BEHALF OF DEFENDANT HAROLD L. ICKES, IN SUPPORT OF HIS RESPONSE TO THE RULE

JURISDICTION

The motion was submitted February 14, 1934. The rule to show cause issued February 19, returnable April 2.

Jurisdiction is asserted under the Constitution of the United States, Article III, Section 2, Clauses 1 and 2. There is no applicable statute.

QUESTIONS PRESENTED

1. Has this Court jurisdiction, in a proper case, to entertain an original bill to perpetuate testimony?

2. Is the testimony offered here admissible or competent for any of the purposes suggested?

3. Is this in real effect a suit against the United States?

CONSTITUTION AND STATUTES INVOLVED

Constitution of the United States, Article III, Section 2, Clauses 1 and 2.

R.S. Sec. 866 (U.S.C., Title 28, Sec. 644):

> * * * and any circuit court, (district court in U.S.C.) upon application to it as a court of equity, may, according to the usages

> of chancery, direct depositions to be taken in perpetuam rei memoriam, if they relate to any matters that may be cognizable in any court of the United States * * *.

The Boulder Canyon Project Act, approved December 21, 1928, c. 42, 45 Stat. 1057–1066. (This Act is printed *in extenso* in the Bill, pp. 25–52.)

An Act to limit the use by California of the waters of the Colorado River, approved March 4, 1929, Statutes of California, 1929, c. 16. (This Act is likewise printed *in extenso* in the Bill, pp. 53–56.)

STATEMENT

This is a motion for leave to file an original bill to perpetuate testimony.

The response of the Secretary of the Interior, filed with this brief, resists the motion on two grounds: (1) that the testimony sought to be perpetuated cannot become admissible or competent on any of the matters to which it is directed; (2) that the suit is in reality against the United States, which has not consented to be sued upon this cause of action.

The allegations of the bill may be summarized as follows:

The Colorado River Compact (Bill, pp. 14–24) between seven States was signed at Santa Fe, November 24, 1922 (p. 24). Article III (a) provided:

> ARTICLE III. (a) There is hereby apportioned from the Colorado River system in perpetuity to the upper basin and to the

> lower basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

The "upper basin" and the "lower basin" are defined in Article II(f) and (g) (pp. 16, 17).

Arizona did not ratify the compact (p. 24) but the other States and the United States have done so (p. 24). In 1928 the Congress passed the Boulder Canyon Project Act (approved December 21, 1928, c. 42, 45 Stat. 1057–1066). This Act is set out *in extenso* in the Bill (pp. 25–52). By it the Congress authorized the construction of the Boulder Dam and other works (Sec. 1), for the purposes set out, at a cost of not exceeding $165,000,000 (Sec. 2 (b)), for which the United States is to be reimbursed, with interest, from the expected revenues, within fifty years of the completion of the works (Sec. 4 (b)). Title to the dam and works is to remain in the United States, which is also to control and operate them (Sec. 6). As to the division of the water, the Colorado River Compact shall control. (Secs. 1, 4 (a), 8 (a), 13 (a), (b), and (c).)

The "lower basin" in the Colorado River Compact consists of portions of five States (Article II (g), Bill, p. 17), and by the compact there is no subdivision of the 7,500,000 acre-feet of water apportioned to the lower basin by Article III (a).

The Boulder Canyon Project Act (Sec. 4 (a)) limits California's taking from this water to 4,400,000 acre-feet, and to this limitation California has agreed. (Cal. Stats., 1929, c. 16, Bill, pp. 53–56.) Congress suggested (Sec. 4 (a), second paragraph) that the balance of these waters be apportioned 300,000 acre-feet to Nevada and 2,800,000 acre-feet to Arizona, but this suggested further compact was not made. (Bill, pp. 63–64.)

Article III (b) of the Colorado River Compact (Bill, p. 18) reads as follows:

> (b) In addition to the apportionment in Paragraph (a), the lower basin is hereby given the right to increase its beneficial consumptive use of such waters by 1,000,000 acre-feet per annum.

It is said by Arizona that this provision was inserted to make good to Arizona the loss occasioned to her by the inclusion in the totals of the waters of the Gila River, which were already largely appropriated and in use in Arizona, and which entered the Colorado too far down to be beneficial elsewhere (Bill, pp. 11–13). It is said, therefore, that the agreement was that all the waters of Article III (b) should go to Arizona, and that a supplemental compact, between California, Nevada, and Arizona, should be made to that effect (pp. 13–14). The testimony sought is that of the survivors of those who attended these discussions (pp. 66–67). The supplemental contract was not made (p. 24).

The Bill does not state whether any draft of it was ever put in writing.

The Boulder Canyon Project Act nowhere refers expressly to Article III (b) of the Colorado River Compact, and makes no express provision for the waters mentioned in that article. Instead Congress proposed (Sec. 4 (a), second paragraph) an agreement between Arizona, California, and Nevada, giving Arizona 2,800,000 acre-feet of the Article III (a) waters, one half of all surplus unapportioned waters, and the exclusive beneficial use of the waters of the Gila River. But this agreement was not made (Bill, pp. 63–64).

The former Secretary of the Interior promulgated certain regulations for the delivery of water (Bill, pp. 56–63) and entered into certain contracts, calling for delivery to users in the State of California of 5,362,000 acre-feet per year (p. 63). This exceeds California's original assignment of the Article III (a) waters by 962,000 acre-feet. Arizona thinks that this excess must come from the 1,000,000 acre-feet of Article III (b), which she says belongs to her (p. 65). Complainant is informed and charges that the present Secretary of the Interior, the defendant in this cause, has continued the regulations promulgated by his predecessor and acknowledges the contracts which his predecessor made "to be valid and binding upon the United States" and proposes to perform them

(p. 64). At the time the bill is filed "no waters are being taken from the Colorado River system under the contracts hereinabove alleged, and no rights of the State of Arizona have as yet been interfered with" (p. 68), but Arizona fears that her waters may be taken in the future and desires to take the proof for use in case they are. Reference is made in that connection (p. 69) to the prior action and to its dismissal without prejudice. *Arizona* v. *California,* 283 U.S. 423. As to the exact purpose of the testimony sought, the bill alleges (Bill IV (m) and VI, pp. 67–68, 68–69):

> (m) That such testimony will be material in the anticipated cause and causes of action in determining the true meaning and intent of said Colorado River Compact, said Boulder Project Act and the conditions thereby attached to patents, grants, contracts, concessions, leases, permits, licenses, rights-of-way and other privileges from the United States and under its authority, and in determining the true purpose and meaning of the limitation of use in the State of California of waters of said Colorado River imposed by said Boulder Canyon Project Act and the act of the legislature of the State of California, herein set out, and the relative and respective rights of each of the parties hereto in and to the waters of said Colorado River and its tributaries and the use thereof and the burdens and restrictions imposed on such use.

VI

That the witnesses hereinbefore named alone know the facts herein stated and will be material and necessary witnesses in the prosecution of litigation, which this complainant will be compelled to institute in order to safeguard and protect the right of complainant and those claiming under it to the use of the waters of the Colorado River system and to carry out the true meaning and intent of the act of the legislature of the State of California and of the Boulder Canyon Project Act in limiting the use of the waters of the Colorado River system in said State.

SUMMARY OF ARGUMENT

I. The Government is of opinion that in a proper case this Court has jurisdiction to entertain an original bill to perpetuate testimony.

II. This is not a proper case, because the testimony sought could never become admissible or competent for any of the purposes stated in the Bill.

III. Assuming that the case were proper in other respects, the United States is a necessary party, and has not consented to be sued.

ARGUMENT

I

THE JURISDICTION

Since this seems to be the first occasion on which application to file a bill of this character has been

made in this Court, and since there is no statute and no rule that provides in words for such a suit, it may be proper to state the Government's views as to the jurisdiction.

Complainant's statement as to jurisdiction bases it directly on the Constitution: Article III, Section 2, clauses 1 and 2. The first question, therefore, is whether such a bill constitutes a "case in equity", or presents a "controversy" within the meaning of the Constitution.

A bill to perpetuate testimony is an ancient, well recognized, and independent head of equity jurisdiction. It is said to have been exercised in England at least as long ago as the reign of William and Mary, and is still exercised there, and it has been recognized and exercised in the United States both by State and the inferior Federal courts. Its existence, in the inferior Federal courts, is recognized by statute, and has been noted by this Court. *West* v. *Lord Sackville,* L. R. (1903) 2 Ch. 378; *Richter* v. *Union Trust Co.,* 115 U.S. 55; *Westinghouse Machinery Co.* v. *Electric Storage Battery Co.,* 170 Fed. 430 (C.C.A. 3d, 1909); *New York, etc., Coffee Polishing Co.* v. *N.Y. Coffee Polishing Co.,* 9 Fed. 578 (C.Ct.N.Y. 1881); Story: *Equity Jurisprudence,* 14th ed., Secs. 1957–1968; Foster: *Federal Practice,* 6th ed., Sec. 345; Encyclopedia of Pleading and Practice, Vol. 16, pp. 353–364; R.S. Sec. 866 (U.S.C., Title 28, Sec. 644). The provision in R.S. 866 (quoted *supra,* p. 5) derives from the Judiciary Act of 1789, 1 Stat. 90, Sec. 30.

It has been in force, in one form or the other, ever since.

The characteristics of the jurisdiction, as developed in these authorities, are these:

1. The sole purpose of the suit is to perpetuate the testimony sought, for use in later litigation. No additional relief is possible, and if any more is sought the bill is multifarious.

2. The jurisdiction is assumed to prevent a failure of justice resulting from the danger of the death of witnesses before the matter can be brought on for trial in an ordinary suit. From this it follows that:

3. The testimony must have bearing on a claim of legal right belonging to the plaintiff, which can be asserted by him, in the future, in some action, and must be such as would be admissible and competent in such an action.

4. It must be impossible for plaintiff to bring his other action now. If he could sue now upon the merits, and take the testimony in that case, there is no occasion to perpetuate it independently.

5. As applying to the Federal courts, of course, the testimony sought must relate to some matter otherwise within their jurisdiction.

The first question, therefore, is whether such a suit, where no relief is sought except to take the proof, no trial ever had, and no judgment ever entered, constitutes a "case" or "controversy" within the judicial power conferred by the Consti-

tution on the courts of the United States. *Muskrat* v. *United States,* 219 U.S. 346.

We have no doubt that it does. The jurisdiction was well recognized, as an independent head of chancery jurisdiction, at the time the Constitution was adopted. Such suits were well known at that time, and were historically within the class of cases in equity. The jurisdiction was provided for (as to the inferior Federal courts) in the first Judiciary Act, and those courts have never doubted that they had it. This Court has stated that they did. *Richter* v. *Union Trust Co.,* 115 U.S. 55. It, therefore, seems quite clear that a proceeding of this sort is properly a "case in equity" within the Constitution.

The next question is whether it requires a special statutory grant of jurisdiction. We think that it does not. In the *Westinghouse Machine* case, *supra,* the court said (170 Fed. 432):

> Since general chancery jurisdiction was vested in the federal courts by the Constitution itself (article 3, § 2), it follows that the provisions of Rev. St. § 866, in reference to Circuit Courts as courts of equity entertaining bills to perpetuate testimony, are but regulations or extensions of chancery jurisdiction in and to particular federal courts, and not the origin of such jurisdiction in federal courts generally. * * *

This seems to be a wholly accurate statement of the situation. It follows that where the underly-

ing controversy is within the original jurisdiction of this Court (because, as here, the plaintiff is a State) this Court has power, in a proper case, to entertain the bill and order the proof taken. The practice is no doubt indicated by Rule 5 of this Court.

II

Is This a Proper Case?

All the essentials exist, provided only that the testimony called for is admissible and competent on any of the matters claimed.

The underlying controversy is as to diversions of water from the Colorado River. Arizona has an interest in that, which she can assert by suit, under numerous authorities. Under the prior decision she may not bring that suit until

> the stored water is used in such a way as to interfere with the enjoyment by Arizona, or those claiming under it, of any rights already perfected or with the right of Arizona to make additional legal appropriations and to enjoy the same.

Arizona v. *California*, 283 U.S. 423, 464. The bill asserts (p. 68) that at the date of filing

> no waters are being taken from the Colorado River system under the contracts hereinabove alleged, and no rights of the State of Arizona have as yet been interfered with * * * and it may be years before any

> waters are taken from said river under said contracts, or the rights of Arizona therein are interferred with * * *.

The Bill asks no relief except that the testimony be perpetuated (pp. 4, 70).

The Bill is, therefore, proper if the testimony sought would be admissible and competent in the future suit proposed. Whether it would be is the question for decision.

The testimony sought relates to an agreement said to have been reached by the negotiators of the Colorado River Compact, but prior to its signature (bill, p. 14) as to the further disposition of the extra water for the lower basin mentioned in Article III (b), the alleged agreement being that that water should all go to Arizona, and that a further compact of three States should be made to that effect (pp. 13–14).

This agreement, if proved as alleged, obviously could have no effect as an agreement. The negotiators had no power to bind their States, nor the United States. Whatever they agreed to was dependent upon ratification by the States and by the Congress. This particular agreement not only was not ratified, but "was never negotiated or signed" (p. 24). Accordingly, it could have no effect as an agreement.

Arizona, therefore, and quite properly, does not claim such effect. What she does assert is that the testimony is material upon the meaning of the Colorado River Compact, the Boulder Canyon

Project Act, the conditions thereby attached to patents, grants, etc., from the United States, the meaning of the California statute, and generally upon the rights of all the parties in the waters of the river (Bill IV, (m) pp. 67–68).

As to the Colorado River Compact, it perhaps is proper to suggest that since Arizona has not ratified it (Bill, p. 24) she cannot claim thereunder, whatever its true meaning. But the compact has been, in substance, enacted as a law of the United States by the Boulder Canyon Project Act, and its provisions do affect the disposition of the waters of the Colorado River. Arizona may well say, therefore, that she has a stake in its true meaning.

The provision sought to be interpreted is this (Art. III (b), Bill, p. 18):

> (b) In addition to the apportionment in Paragraph (a), the lower basin is hereby given the right to increase its beneficial consumptive use of waters by 1,000,000 acre-feet per annum.

"Lower basin" as here used is defined by Article II (g) (Bill, p. 17) as follows:

> (g) The term "Lower Basin" means those parts of the States of Arizona, California, Nevada, New Mexico, and Utah within and from which waters naturally drain into the Colorado River system below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River system which are now or shall here-

> after be beneficially served by waters diverted from the system below Lee Ferry.

The interpretation claimed is that "lower basin" in Article III (b) should be read as "Arizona." In view of the clear language of Article II (g) that is impossible. It is not interpretation that is asked for, but a revision of the contract, or a supplemental contract which the parties never made.

The next document to be interpreted is the Boulder Canyon Project Act. The specific sections upon the meaning of which light is to be thrown are not indicated in the Bill, but no doubt they are those sections which refer to the Colorado River Compact (Secs. 1, 4 (a), 8 (a), 13 (a), (b), and (c)), and especially 4 (a), which operates to limit California's taking from the waters of the river. In the latter section there may be an ambiguity, for it is not wholly clear whether the "excess or surplus waters unapportioned by said compact" and of which California's taking must not exceed one half (Sec. 4 (a), first paragraph), are surplus waters after Article III (a) alone, or after III (a) plus III (b). The III (b) waters, as such, are nowhere directly referred to in the Act.

Assuming that there is a question for construction, it is in an Act of Congress, and this Court has often pointed out what aids may be resorted to to solve it. Reference is proper to reports of the Committees, including sometimes oral statements as to meaning made by the Committee Chairman

on the floor; but general debate in Congress on the very bill is regarded as an unreliable guide, and will generally not be resorted to. *Lapina* v. *Williams,* 232 U.S. 78, 90; *United States* v. *St. P. M. & M. R. Co.,* 247 U.S. 310, 316–319; *Duplex Printing Co.* v. *Deering,* 254 U.S. 443, 474–475. In this case it is proposed to interpret an Act of Congress passed in 1928 by what certain gentlemen, not members of the Congress, agreed to at a conference, in Santa Fe, in 1922. The effort is without reasonable basis.

As to the interpretation of the act of California the same principles apply.

As to the interpretation of the patents, grants, etc., from the United States, mentioned also in the Bill (p. 67), the reference is evidently to that provision of the Boulder Canyon Project Act (Sec. 13 (c)) which makes such grants subject to the Colorado River Compact. Interpretation of the conditions of each grant is merely a result of interpretation of the Compact, and if the latter cannot be subjected to interpretation by this testimony, then also the grants cannot.

It therefore seems quite clear that as to each of the documents concerned the testimony sought to be perpetuated can never become admissible or competent. If this is right, it ought not to be taken.

It is not intended to suggest that Arizona will never have a cause of action on the merits of the

underlying question. This Court has said she may have. *Arizona* v. *California,* 283 U.S. 423, 463–464. But that can happen only "in case the stored water is used in such a way as to interfere with the enjoyment by Arizona, or those claiming under it, of any rights already perfected or with the right of Arizona to make additional legal appropriations and to enjoy the same." Same, p. 464. Surely, if this happens, the rights of all the parties in these waters will depend, not on any oral understanding or gentlemen's agreement reached at Santa Fe in 1922, and never signed or ratified, but on the question whether, in the actual conditions as they shall then exist, the actual division of these waters is unlawful. That case will not depend on any legalistic claims on either side, but on the provisions of the controlling legislation and the considerations of equal and fair dealing between States, and actual beneficial uses of the water, which this Court has applied in all these cases. *Kansas* v. *Colorado,* 185 U.S. 125, 146; *Kansas* v. *Colorado,* 206 U.S. 46, 100; *Missouri* v. *Illinois,* 200 U.S. 496; *Wisconsin* v. *Illinois,* 278 U.S. 367, 281 U.S. 179; *Connecticut* v. *Massachusetts,* 282 U.S. 660, 669–673.

III

Is This a Suit Against the United States?

Since this Bill prays for no relief except to take and to record the proof, it may be thought that this suggestion is superfluous. But this suit is a mere

aid to another, and if the Court can see that that other, necessarily, will be one which the party cannot bring, the proof should not be taken.

It is difficult to speculate about a future lawsuit which is not before the court. Inspection of this Bill, however, shows that the future suit, to which it is an aid, must be to stop or to reduce the taking, for use in California, of water from the Boulder Dam. It will necessarily, if Arizona's claims are sound, strike down the contracts which the Bill asserts (p. 63) the United States has made, to deliver 5,362,000 acre-feet of water for use in California.

Under the Boulder Canyon Project Act the Government expects repayment out of these and other contracts, over a period of fifty years, of the whole cost of the dam and works. By Section 4 (b) of the Act the dam could not be built until contracts sufficient for that purpose were secured. It therefore seems quite clear that a suit against those contracts would concern directly the Government's property and revenues, and could not be maintained without its consent. *Louisiana* v. *McAdoo,* 234 U.S. 627; *New Mexico* v. *Lane,* 243 U.S. 52; *Wells* v. *Roper,* 246 U.S. 335.

CONCLUSION

It is therefore submitted that the motion for leave to file the Bill should be denied, and the rule discharged.

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APRIL 1934.

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No. (Original)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

STATE OF ARIZONA, *Complainant,*

vs.

STATE OF CALIFORNIA, ET AL., *Defendants.*

CLOSING BRIEF OF DEFENDANTS THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, THE CITY OF SAN DIEGO AND THE COUNTY OF SAN DIEGO.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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CLOSING BRIEF OF DEFENDANTS THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, THE CITY OF SAN DIEGO AND THE COUNTY OF SAN DIEGO.

INTRODUCTION.

We said in our opening brief that (1) no ambiguity exists in Article III(b) of the Colorado River Compact wherein certain water is allocated to the Lower Basin (this being the section sought by the bill to be interpreted); (2) that even if such ambiguity were found to exist it could not be resolved by

testimony relating to informal conversations between negotiators of the Compact but must be considered only in the light of matters before the legislatures of the respective states ratifying the Compact and before the Congress. We have pointed out that all of the phases of the problem mentioned in the Bill relate back to the Compact and that the testimony sought to be perpetuated relates solely to Article III(b) of that document and is in no way directed to or in aid of interpretation of the various other statutes and documents mentioned in the Bill, except in so far as they refer back to Article III(b) of the Compact.

We find upon examination of Arizona's brief that the allegations relating to the supposed collateral agreement concerning Article III(b) have been virtually forgotten; that the ambiguity now sought to be resolved lies in Article III(a) and relates to the question whether the Compact apportioned waters of the Colorado River System including its tributaries, or only apportioned waters of the main stream as at Lee Ferry; and that the discussion of Article III(b) makes the real targets the Boulder Canyon Project Act and the California Limitations Act of 1929. We shall point out in this brief that the basic theories of the Bill and of Arizona's brief are diametrically opposed. The bill says that the Gila and other tributaries were included in the Compact, but that Arizona is entitled to prove a parol bargain giving her 1,000,000 acre feet in return (Bill, pp. 11-13); the brief argues that the negotiators excluded the Gila and other tributaries and apportioned only main stream water (p. 10). The Bill specifies, as the sole

evidence offered for perpetuation, a conversation held in Santa Fe, New Mexico, in 1922, known only to the participants (Bill, p. 13, 68); the brief is concerned largely with statutes enacted six years later (Brief, pp. 12-19).

I.

THE COMPACT IS FREE FROM AMBIGUITY.

An examination of the allegations of the Bill offered to be filed by Arizona reveals, assuming as we must that such allegations are true, that the framers of the Compact said exactly what they intended to say and said it clearly and without ambiguity.

First, as to Article III(b): It is alleged (Bill, p. 13) that

> "* * * it was agreed that in view of the fact that no appropriation or allocation of water had otherwise been made by said compact directly to any State, the one million acre feet for the State of Arizona should be included in said compact *by an allocation for the Lower Basin.*"*

As appears by the language in the paragraph following the words just quoted, it was left to a supplemental compact, which has never been made, to give effect to the alleged agreement to give all such waters to Arizona (Bill, pp. 13 and 14). In other words, the allegation emphasizes the fact that the framers of the Compact said and intended to say that the "Lower Basin" should be the beneficiary of Article III(b). The alleged agreement to make an agree-

*All italics are supplied unless otherwise noted.

ment was never carried out and is, of course, not binding on any one.

Second, as to the claim (appearing for the first time in the brief filed by Arizona, page 10) that the Compact divides only main stream water and has no effect on tributaries: the allegations of the Bill defeat the theory presented in the Brief. The Bill alleges (Bill, pp. 11 and 12) that

> "A draft of the proposed compact, based on the inclusion of the Gila River and its tributaries within the definition of the Colorado River system and the division of the waters thereof between the upper basin and lower basin, as hereinbefore defined, was prepared and submitted to said conference. *The representatives of all the States and the United States except the Arizona delegation were in agreement as to the definition of the Colorado River system, including the Gila River and its tributaries,* and as to the division proposed, which substantially apportioned the waters of the Colorado River at Lee Ferry, the point selected as dividing the Upper Basin from the Lower Basin."

The Bill then goes on to allege that

> "The Arizona delegation refused and declined to accept the proposed Compact because of the inclusion of the Gila River and its tributaries without any compensating provision to the State of Arizona in lieu of the waters thereof * * *"

Again it is alleged in the Bill (p 13) that it was agreed

> * * * "that said one million acre feet apportioned by subdivision (b) of Article III of said Compact was intended for and should go to the State of Arizona to compensate for the

> waters of the Gila River and its tributaries being included within the definition of the Colorado River system * * *"

It is clear from the allegations of the Bill that the framers of the Compact in writing that document said exactly what they intended to say and apportioned waters of the Colorado River system inclusive of its tributaries, not main stream water only.

Turning to the Compact for demonstration of this point we find a specific definition of the words "Colorado River System" (bill, p. 16):

> "The term 'Colorado River system' means that portion of the Colorado River *and its tributaries* within the United States of America."

In Article III(a) (Bill, p. 17) it is provided that

> "there is hereby apportioned from the *Colorado River system* * * * to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum."

Article III(b) (p. 18) refers to and allows to the Lower Basin one million acre-feet of "such waters", which can mean nothing other than the waters of the Colorado River System.

It is manifest that the framers of the Compact clearly intended to and did deal with the Colorado River System inclusive of its tributaries.

Nevertheless, and in contradiction of the Bill and the Compact, we find this statement in Arizona's Brief (p. 10):

> "In fact it seems to be apparent upon a consideration of the entire compact that the framers

> thereof were apportioning waters of the main stream of the Colorado River as at Lee Ferry. It must be borne in mind that all of the tributaries of the upper division, or upper basin, empty into the Colorado River above Lee Ferry and that the records of flow upon which the apportionment of the Colorado River Compact was made, were kept at Lee Ferry. It is the natural dividing point between the upper and lower basins, the point at which the waters of the upper basin have reached the main stream and the point at which record as to the total flow was obtainable at that time and now."

and again on page 11 of her Brief, Arizona says:

> "This certainly constitutes an ambiguity in the Colorado River Compact, which we submit can be resolved and reconciled only by recognition of the fact that the framers of the Compact intended that the 1,000,000 acre-feet per annum permitted to the lower basin by Article III(b) was not in the main stream at all, but was in the tributaries existing in the lower basin."

The only tangible point which Arizona urges in support of the idea that there is any ambiguity as to what waters were treated in the Compact is found in the fact that in Article III(d) the States of the Upper Division agree that they will not cause the flow of the river at Lee Ferry (obviously main-stream water plus all tributaries above that point) to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years. While it happens that the figure is ten times the annual apportionment of the waters of the entire system to the Lower Basin under Article III(a). the obligation

with reference thereto is totally different from the obligations created by Article III(a) and III(b). Article III(d) would be satisfied if the flow were to be depleted to 5,000,000 acre-feet during certain years but increased during others to compensate, so that the ten years' total would be brought up to 75,000,000 acre-feet. Not so the obligations of III(a); therein a certain annual apportionment is made which would not be satisfied by a long term average but must be met annually. The apportionment of waters of the "system", inclusive by specific definition of all tributaries in the United States, appearing in Article III(a) is in no wise affected or diminished by the long-term average requirement. Each of the obligations of Article III(a) and III(d) can be satisfied without conflict. The average of the 75,000,000 acre-foot guarantee is said by Arizona to be identical with the lower basin's annual apportionment under Article III (a). The compact's language demonstrates the contrary. The apportionment in Article III (a) is of "the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum." Consumptive use is, as said for instance in the Project Act, diversions less returns to the river (sec. 4; Bill, p. 30). Even if all the 75,000,000 acre-feet delivered by the Upper Basin at Lee Ferry survived further evaporation and channel losses and were all diverted, an additional amount would be required to enable the beneficial consumptive use of that quantity, for returns to the river are not part of such consumptive use. The ten year guarantee is gross; the annual apportionment is net. Inasmuch as the two provisions relate to two clearly severable

obligations and are in no wise inconsistent one with the other, their joint presence in the Compact gives rise to no ambiguity whatever.

No oral testimony could be received under established rules of evidence to resolve an ambiguity which does not exist.

In our opening brief we said that testimony contradicting the plain language of the Compact was inadmissible, whether the treaty be viewed as a written contract protected by the parol evidence rule or as a statute protected by the rules of statutory construction. This is true whether the proposed testimony relates to Article III(b), as the Bill says, or to Article III(a), as the Brief suggests. As to the matter of statutory construction, Arizona cites no cases. On the point relating to the parol evidence rule Arizona cites ten cases, all of them dealing with contracts in which the language was manifestly ambiguous or which referred to transactions which parol evidence was necessary to identify; as, for instance, the exception of certain cattle previously sold, from a contract of sale (*Lonergan v. Buford,* 148 U. S. 581); the fixing of the amount of oats for which a bid had been accepted (*Merriam v. United States,* 107 U. S. 437); the debts covered by a settlement (*Runkle v. Burnham,* 153 U. S. 216); whether a letter agreeing to a settlement was without prejudice (*West v. Smith,* 101 U. S. 263), and so on. No case has been cited which says that parol evidence can be introduced to contradict the terms of a written contract, and the contrary rule is expressed in some of the cases cited.

II.

EVEN IF THE COMPACT WERE AMBIGUOUS THE PROPOSED TESTIMONY WOULD BE INADMISSIBLE.

We have already presented full argument that even if an ambiguity did exist in the Compact, interpretation could not be aided by testimony concerning conversations had between negotiators who had no power to bind their principals. Any ambiguity must be aided if at all by material properly before the respective state legislatures and before the Congress by which the Compact was approved and made binding. This argument, heretofore presented, is as applicable to the "main stream water" theory set up in the Brief as it is to the "all III(b) water to Arizona" theory set up in the Bill. We therefore refrain from repetition.

III.

THE REAL TARGETS OF ARIZONA'S ATTACK ARE THE BOULDER CANYON PROJECT ACT AND THE CALIFORNIA LIMITATIONS ACT.

A study of Arizona's Brief brings out that the real nub of Arizona's complaint lies not in any language of the Compact which, according to her own allegations, clearly states what it was intended to state, but in the language of the Boulder Canyon Project Act and the California Limitations Act, enacted respectively six and seven years after signature of the Compact. These Acts in identical language limit California to 4,400,000 acre-feet of the

waters apportioned to the lower basin by paragraph (a) of Article III of the Colorado River Compact, plus not more than one-half of any excess or surplus waters unapportioned by said Compact. (Bill, pp. 30 and 31; also p. 55)

Article III(b) is not specifically mentioned in the two Acts referred to. Arizona desires to lay a foundation for the contention that no part of the 1,000,000 acre-feet referred to in Article III(b) is available for appropriation in California. We do not deem this an appropriate action or proceeding in which to determine the point thus suggested. The question before us now is whether oral testimony relating to conversations occurring in Santa Fe in 1922 could affect or be admitted in aid of the interpretation of the Boulder Canyon Project Act adopted in 1928 or the California Limitations Act adopted in 1929. It appears from the Bill that the claimed conversations were not known to any persons other than the witnesses named in the bill. (Bill, p. 68.)

That which Arizona seeks to interpret is not the Compact but the subsequent legislation. The rules governing statutory construction are well established. Arizona's proposal does not conform to them. In effect, this is an offer of conversations occurring between persons not members of any legislative body and not communicated in any way to the members of such legislative bodies, and known only to participants at Santa Fe (Bill, p. 68).

But it is suggested in Arizona's Brief (p. 17) that complainant

> "hopes to be able to show in the case hereafter to be brought by it, by competent, relevant and material evidence of the hearings and reports

> of the Congressional committees and statements made in Congress and the legislative history of the Act, that it was the intent of Congress to impose a limitation on California by the terms of the Boulder Canyon Project Act of 4,400,000 acre-feet of the water apportioned by Article III(a) of the Compact plus one-half of the surplus or unapportioned waters of the main stream of the Colorado River, thereby saving to Arizona its tributaries and the 1,000,000 acre-feet per annum therefrom permitted by the understanding, of which testimony is sought to be perpetuated and assuring to Arizona and those claiming under it the right to appropriate one-half of the surplus or unapportioned waters of the main stream present in the lower basin for use, in excess of the 7,500,000 acre-feet apportioned to the lower basin by Article III(a) of the Colorado River Compact."

The hope stated in the quoted paragraph presupposes that the statutes concerned are ambiguous and uncertain. We say that they are not. But if they were, the proposed testimony would be inadmissible. If the alleged transactions are, as Arizona says, part of the legislative history of an act, that legislative record speaks for itself and cannot be augmented or diminished by what was said and done at Santa Fe. Further, "hearings" do not constitute a committee report; "statements made in Congress" do not bind Congress, with narrow exceptions not relied on by Arizona; and even the report of a committee cannot contradict a statute. The cases on these elemental propositions were cited in our opening brief and none have been cited in answer.

CONCLUSION

Arizona's brief (page 22) inquires "Who can say that the testimony herein sought to be perpetuated will not be admissible?"

This appears to be an unwarranted shifting of the burdens of this action. Complainant has set up certain specific purposes which the testimony sought to be perpetuated is supposed to serve. That is, these witnesses "alone know the facts relating to the true construction, meaning and intent of said subdivision (b) of Article III of the said Colorado River Compact." Arizona says that these witnesses will show that an oral agreement was made at a specified time and place to one specific effect: "that the waters apportioned by Article III, (b), of said compact were for the sole and exclusive use and benefit of the state of Arizona", and that a "supplemental compact should so provide" (Bill, p. 14). If this is the testimony and this is the issue, the admissibility of the evidence can be determined now as effectively as it may be in subsequent litigation, after it shall have been recorded. If the complainant is not to be held to the issue stated in the bill, the alternative is the recordation of evidence not addressed to any particular subject but which, it is claimed, some day in some court or before some tribunal might possibly be pertinent to some unforeseeable and unframed issue. We cannot assume that this court will tolerate anything in the nature of a fishing expedition.

Arizona's brief argues that the Compact does not affect her tributaries below Lee Ferry because, according to the theory of the brief, only main-stream water at that point is apportioned by the Compact;

while at the same time her bill claims 1,000,000 acre-feet of III(b) water upon the ground that it was given her in lieu of and to compensate for the inclusion of her tributaries in the Compact apportionment.

If this Court permits testimony to be taken on the basis of Arizona's brief, the effect will be to confuse the use of all waters of the Colorado River system affected by the Compact for whatever length of time intervenes between the taking of the testimony and the final decision of the future suit in which Arizona proposes to use that evidence. All of the objections we raised in our first brief to the proposed modification of Article III(b) apply with increased emphasis to this new venture into Article III(a). The proposed testimony, if it supports Arizona's contention, will directly contradict the terms of Article II(a) of the Compact, which defines the Colorado River system (Bill, p. 16) as well as Article III(a), which declares that an apportionment of waters of the system is being made (Bill, p. 17). In both clauses, Arizona's proposed revision would have the effect of rewriting the Compact so as to accomplish without the consent of the six other states and the United States what her negotiator failed to accomplish in 1922: namely, the elimination of the Lower Basin tributaries from the division of waters. She proposes to show that the negotiators did just what her Bill says they refused to do; that is, restrict their agreement to waters of the river at Lee Ferry.

The Bill implies what the Brief fails to admit: That the six parties to the Compact would have re-

fused to accept it if Arizona's present construction were correct.

Arizona's motion for leave to file its bill should be denied.

Respectfully,

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No. (Original)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

STATE OF ARIZONA, *Complainant*,

v.

STATE OF CALIFORNIA, ET AL., *Defendants*.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CITY AND COUNTY OF DENVER.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Cases cited:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. ORIGINAL

STATE OF ARIZONA, *Complainant,*

v.

STATE OF CALIFORNIA, ET AL., *Defendants.*

MOTION OF THE CITY AND COUNTY OF DENVER FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

The City and County of Denver, a municipal corporation organized and existing under and by virtue of the Constitution and laws of the State of Colorado, by its Board of Water Commissioners, moves the Court for leave to file a brief amicus curiae in opposition to the motion of the complainant to file its Bill herein, and submits such brief herewith.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933.

No. (ORIGINAL)

STATE OF ARIZONA, *Complainant,*

v.

STATE OF CALIFORNIA, ET AL., *Defendants.*

BRIEF AMICUS CURIAE OF THE CITY AND COUNTY OF DENVER IN OPPOSITION TO THE MOTION OF THE COMPLAINANT TO FILE ITS BILL HEREIN.

JURISDICTION.

This is an original action by a State, asserting jurisdiction under the Constitution of the United States, Article III, section 2, clauses 1 and 2. No statute is applicable.

The motion of the complainant was submitted February 14, 1934, for leave to file its bill to perpetuate testimony.

QUESTIONS PRESENTED.

1. Has this Court jurisdiction to entertain an original bill to perpetuate testimony?

2. Would the proposed testimony, if taken, be admissible for any purpose suggested by the complainant?

3. Is the United States, which has not consented to be sued, an indispensable party?

CONSTITUTION AND STATUTES INVOLVED.

Constitution of the United States, Article III, section 2, clauses 1 and 2.

The Boulder Canyon Project Act, approved December 21, 1928, c. 42, 45 Stat. 1057-1067, which appears in full in the Bill, pp. 25-52.

The Colorado River Compact, authorized by the Act of August 19, 1921, and approved by the Boulder Canyon Project Act, *supra,* and which Compact appears in full in the Bill, pp. 14-24.

STATEMENT.

The Colorado River Compact was drafted in Santa Fe, New Mexico, in 1922, by certain negotiators representing the seven states in the Colorado River basin under the chairmanship of the Honorable Herbert Hoover, representing the United States.

Complainant has tendered for filing its Bill to perpetuate the testimony of such of these seven negotiators as are now living and also of certain other persons who attended the said Santa Fe conference.

To its Bill complainant has named as defendants the six states, which, with the complainant, comprised the seven states represented at the Santa Fe conference. Complainant has also named as defendant to its Bill Honorable Harold L. Ickes, Secretary of the Interior of the United States. Complainant has also made defendants certain municipal corporations of the State of California, as water users or potential water users of water from the Colorado River.

The purpose of the Bill, as expressed therein, is to perpetuate the testimony of certain persons for use

in suits to be later brought by the complainant concerning the meaning of the Colorado River Compact and the Boulder Canyon Project Act and certain related matters. (Bill, pp. 67, 68.)

While complainant makes a number of California municipalities defendants to its Bill, it does not make the City and County of Denver, a municipality of the State of Colorado, such a defendant, although Denver is just as much a potential water user from the Colorado River as are the California municipalties made parties defendant. The only way, therefore, that Denver can present its position in regard to the Bill is as amicus curiae, and this brief has been caused to be prepared by the Board of Water Commissioners of the City and County of Denver for that purpose.

SUMMARY OF ARGUMENT.

1. The question of jurisdiction of the Court may be open to doubt.

2. The testimony sought could never become admissible or competent for any of the purposes stated in the Bill.

3. The United States is an indispensable party, and has not consented to be sued.

ARGUMENT.

I.

The Jurisdiction.

The question of jurisdiction has been discussed fully and elaborately in the brief filed by California and its municipalities and Denver adopts such California statement as fully as though repeated herein.

II.

The Proposed Testimony Would Not Be Admissible or Competent.

This matter is discussed in the brief of defendant Harold L. Ickes and more fully in the brief of California and its municipalities and this present brief will only deal with certain phases for the purpose of bringing out more fully certain matters.

Whenever it becomes necessary to refer to facts not alleged in the Bill, every effort will be made to refer only to such facts as are matters of common knowledge and therefore to be judicially noted; but we trust we will be pardoned if we unintentionally overstep in this statement of facts.

The tendency for a number of decades last past has been for our population in the United States to center in the larger cities. This has resulted in the matter of urban water supply becoming vastly more important than in the earlier history of the United States. Moreover the general record of all large cities is that the amount of water used per capita is rapidly increasing. Consequently the problem of water supply for cities is ever becoming of greater consequence.

This matter of the necessity for increasing amounts of water for urban use was brought to the attention of this Court in Connecticut v. Massachusetts, 282 U. S. 660, where this Court sustained the right of the Massachusetts legislature to make radical changes in the basic law of waters of that state in order to permit of the providing of sufficient water for city use.

If water is so vital for the cities of Massachusetts,

it needs no stretch of the imagination to picture the necessity of cities in the arid region, like Los Angeles and other Southern California cities and Denver, to have an ample water supply. And it so happens that these cities, situated nearly two thousand miles apart, depend on the waters of the same stream—the Colorado River—for their possibility of future growth. Each has used up in its existing plant all the nearby sources of water, and each must go to the Colorado River for the increasing supply of water which each needs.

Both California municipalities and Denver have already spent millions of dollars in beginning the development of their water supply from the Colorado River and each is now spending large sums of money in the prosecution of such development.

These large expenditures, in the main, have been made since the adoption of the Colorado River Compact and in reliance thereon. Without the Compact there would be much uncertainty as to the waters of the Colorado River. Litigation over the waters of interstate streams, which is the method used in the past for settling the relative rights of the various interested states, has not been productive of finality in the settling of these rights. The first suit over the Arkansas, Kansas v. Colorado, 206 U. S. 46, was followed by another suit, Kansas v. Colorado, 275 U. S. 511. And, in like manner the first suit over the waters of the Laramie, Wyoming v. Colorado, 259 U. S. 419, is now followed by another, Wyoming v. Colorado, 282 U. S. 75.

In view of this difficulty of obtaining final settlement of the waters of interstate streams by litigation,

it is not surprising that efforts have been made in recent years to secure such settlements by treaty—that is, by compacts. It may be, of course, that compacts will not prove to be any more efficient than litigation has been in settling these water controversies; but at any rate the new method of settlement by compact should be given a fair trial, and these compacts should be upheld whenever fairly possible.

It is this desire to see the Colorado River compact upheld that has induced the preparation of this brief, on behalf of the City of Denver. The position of Denver is very simple. It is that Arizona, by tendering this Bill, is attempting to whittle down the Colorado River Compact. She is attempting to do it, by trying to preserve as evidence the conversations of persons who were present at Santa Fe when the compact was negotiated. These persons are not only the negotiators but certain additional persons named in the Bill, who were present in a private capacity to advise the negotiators.

Complainant seeks to justify her Bill by referring to the well known rule that in construing ambiguous contracts, the declarations of the parties may be considered. But the persons present at Santa Fe, whether they were negotiators or advisers, were not parties to the contract. The parties were the United States and the several states, and the United States and the several states became parties to the contract solely by legislative action ratifying the contract.

The Colorado River Compact, therefore, having only become binding by legislative action, must be construed like any other piece of legislation. There are certain matters, such as committee reports, etc.,

which may be looked to in construing ambiguous legislation, but these are contained in public records. It is both their public nature and their intimate relation to the legislation that makes the matters admissible in construing legislation.

In the case of the matters set out in the Bill, however, there are lacking both the public character of the evidence and its intimate relationship to the legislation. The lack of public records is evidenced by the very purpose of the Bill which is to create a private record. And it is apparent at a glance that words spoken by negotiators and their advisers in Santa Fe and not communicated to Congress or the several state legislatures cannot have influenced the forming of the legislation.

The meaning of legislation, on the strength of which municipalities have spent and are spending millions of dollars, should not depend on private statements made by negotiators and by the advisers of these negotiators; and that is precisely what is sought by the Bill. The mere perpetuation of the testimony is bound to have some effect in removing confidence in the efficacy of the Colorado River Compact; and such removal of confidence cannot but be harmful to the municipalities engaged in prosecuting these vast enterprises.

III.

Is the United States, Which Has Not Consented to be Sued, an Indispensable Party?

This matter has been fully and carefully discussed in both the brief of defendant Harold L. Ickes and

the brief of the California defendants, and nothing need be added to such discussion.

CONCLUSION.

It is respectfully submitted that the motion of complainant for leave to file the Bill should be denied.

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